Selection of Leading Cases

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,ND TENURE AND PRESCRIPTION

Supplementary Cases

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SELECTION OF LEADING CASES.

LAND TENURE AND PRESCRIPTION.

Present:—Lord Macnaghten, Sir Ford North, Sir Andrew Scoble and Sir Arthur Wilson.

THAKURAIN RITRAJ KOER

v.

THAKURAIN SARFARAZ KOER.

[*Reported in 2 C. L. J. 185 P. C.; L. R. 32 I. A. 165; I. L. R. 27 All. 655 P. C.; 9 C. W. N. 889 P.C.*]

P. C.
1905.
June, 29.

Their Lordships' judgment was delivered by

Sir Andrew Scoble.—The parties to this appeal are the owners of estates situated on opposite sides of the river Gogra, in the Province of Oudh. The plaintiff, who is now the appellant, is the widow and heiress of Thakur Rachpal Sing, and as such the present holder of the taluka of Kamyar in the District of Barabanki on the south bank of the river; and the defendant now on the record (the respondent) is the widow of the son of the original defendant, Thakur Raghubir Sing, the Talukdar of Dhanawara, in the District of Gonda, on the north bank of the river. The suit was brought to recover possession of certain alluvial lands, 2,062 acres and 10 roods in extent, which the plaintiff claimed as an accretion to her estate of Kamyar, by reason of a change in the channel of the river. The Subordinate Judge of Gonda made a decree in favour of the plaintiff, but this was reversed on appeal by the Judicial Commissioner, and the suit was dismissed with costs.

The law of India in relation to cases of this kind is contained in Bengal Regulation XI of 1825, which was applied to Oudh, with some unimportant modifications, by Act XVIII of 1876. The principle laid down in this Regulation, as Lord Justice James observes in giving the judgment of this Committee in the

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well-known case of *Lopez* v. *Muddun Mohan Thakoor*,[1] "is one not merely of English Law, not a principle peculiar to any system of municipal law, but it is a principle founded on universal law and justice; that is to say, that whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes from a volcano, or a field covered by the sea or by a river the ground, the site, the property, remains in the original owner."

The first point to be ascertained, therefore, is, who was the original owner of the property in dispute in this suit; and on this point their Lordships are of opinion that there is no room for doubt that it was the property of the respondent's predecessor in title. Indeed, the plaint itself describes the land as "situate in the villages Raksaria, Bharsandu, Pura Angad and Dulahpur," which admittedly form part of the respondent's taluka; and the Subordinate Judge is clearly mistaken in treating it as land "opposite" to those villages. For, not only is the statement in the plaint perfectly definite on the point, but it is repeated six years after the filing of the plaint, and after issues had been settled in which the question of position of the land had been specifically raised, in a petition in which the plaintiff impeached the correctness in other respects of a map prepared for the suit by an Amin or Commissioner, appointed by the parties. Presumably land situated in the respondent's villages would belong to the respondent whether covered by water or not, and however it might be intersected by the river in its devious course from year to year. This view was adopted by the local authorities in proceedings taken in 1883 under the Code of Criminal Procedure for possession of the land, and upon application to the Revenue officials in 1885 for the demarcation of boundaries. And in July, 1885 the Revenue Settlement of "the alluvial and diluvial land" of these villages was made with Thakur Raghubir Sing, the respondent's predecessor in title. It would require very strong evidence on the part of the appellant to disturb the conclusion thus arrived at, and no such evidence has been adduced.

The learned counsel for the appellant contended that whoever may have been originally entitled to the land, it had gradually

[1] (1870) 13 M. I. A., 467.

become accreted to the appellant's property by an alteration in the course of the river ; and he relied in support of his contention, on a passage in the judgment in the case of *Lopez* v. *Muddun Mohun Thakoor* [1] in which it is stated that "where there is an acquisition of land from the sea or a river by gradual, slow, and imperceptible means, there, from the supposed necessity of the case, and from the difficulty of having to determine year by year to whom an inch or a foot or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land." Of the correctness of this proposition there can be no doubt ; but in the opinion of their Lordships it is entirely inapplicable to the present case. Here is no question of a gradual and slow process of acquisition to be measured by the inch or the foot or the yard ; here land to the extent of more than two thousand acres is claimed not on the ground that the action of the river has been slowly and gradually to push forward the northern boundary of the appellant's land but that the northern channel of the river, however it may shift, must be taken to be that boundary. Nor is it the case here that the land laid bare by the alteration of the river's course adjoins the land of the respondent ; on the contrary, the evidence is that there is still a channel of the river between the two properties although the main stream has shifted to the north.

It appears to their Lordships that this is one of the cases provided for by the second clause of the fourth section of the Regulation, which enacts that the rule as to gradual accretion "shall not be considered applicable to cases in which a river by a sudden change of its course, may break through and intersect an estate, without any gradual encroachment, or may, by the violence of stream, separate a considerable piece of land from one estate and join it to another estate without destroying the identity and preventing the recongition of the land so removed. In such cases the land on being clearly recognised shall remain in the property of its original owner." This is in accordance with the English law, as laid down in the case of *The Mayor of Carlisle* v. *Graham*.[2] "All the authorities ancient and modern, are uniform to the effect that if by the irruption of the waters of a tidal river, a new channel is formed in the land of a subject, although the rights of the

[1] (1870) 13 M. I. A., 467.

[2] (1869) L. R. 4 Ex. 361 at 368.

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Crown and of the public may come into existence and be exercised in what has thus become a portion of a tidal river, the right to the soil remains in the owner, so that if at any time thereafter the water shall recede, and the river again change its course leaving the new channel dry, the soil becomes again the exclusive property of the owner, free from all rights whatsoever in the Crown or in the public." It is perhaps unnecessary to add that, although the specific reference in that case is to a tidal river their Lordships consider the principle equally applicable to a non-tidal river.

Their Lordships will humbly advise His Majesty that this appeal ought to be dismissed and the decree of the Judicial Commissioner confirmed. The appellant must pay the costs of the appeal.

Appeal dismissed.

NOTE.

The cardinal rule of the Roman Law is that laid down in the Institutes of Justinian (Bk. II, Tit. I, Sec. 20) which is in these words:— "That which is added to your land by alluvion becomes yours by a rule of law universally acknowledged. Now alluvion is an imperceptible increase and that is considered to be added by alluvion which is added so gradually that no one can perceive how much is added at any one moment of time."

Exception (2) stated in paragraph (2) of Section 4 of the Bengal Alluvion and Diluvion Regulation (XI of 1825) is similar to that which is contained in the Institutes of Justinian (Bk. II, Tit. I, Sec. 21), where it is said, "if the violence of a river should have detached a portion of your land and united it to that of your neighbour, it undoubtedly remains yours."

Probably all the cases contemplated in these two exceptions would be excluded by the terms of the rule itself which requires that the accession shall be gradual.

If the lands had been formed by natural causes, that is to say, by alluvion, the right to them would be with the person to whose land or estate it is annexed, subject to the payment of such additional revenue as Government might assess on them. If, on the other hand, the lands had appeared owing to artificial causes, he could claim no title to them and it would be for the Court to determine in accordance with the provisions of Cl. (5) of S. 4 of Reg. XI of 1825 whether they were not public property and whether the settlement by Government with other person could be disturbed. Thus where lands had in fact become dry not naturally by accretion through gradual alluvion but by the dereliction of the river by reason of the diversion of its water through an artificial channel, the riparian owner has no title to it. *Kanta Proshad* v. *Abdul Jamir*, 8 C. W. N., 676.

Land raised out of water by a convulsion of nature such as an earthquake is a land formed by dereliction and not by alluvion. *Jagat Kishore* v. *Mea Chand*, 5 C. L. J., 47 N.

KRIPA SINDHU MUKERJEE

v.

ANNADA SUNDARI DEBI.

Before: The Hon'ble Mr. R. F. Rampini, Acting Chief Justice, Mr. Justice Brett, Mr. Justice Mitra, Mr. Justice Woodroffe and Mr. Justice Mookerjee.

[*Reported in I. L. R. 35 Calc. 34 F. B.; 6 C. L. J. 273 F. B.; 11 C. W. N. 983 F. B.*]

1907. July, 29.

The judgments of the Court were as follows :—

Rampini, A.C.J.—The question referred to us in this reference is: Whether to stop interest running, a tender of rent, which is improperly refused, must be followed up by a deposit of rent in Court under section 61 of the Bengal Tenancy Act or whether such a tender, so refused, if kept good, that is, if repeated as each instalment of rent falls due, is sufficient to stop interest running from the date of the tender?

I am of opinion that the first part of this question should be answered in the affirmative and the latter part in the negative, and would follow the decisions of this Court in *Raja Ransgit Singha* v. *Bhagabutty Charan Roy*,[1] and in Second Appeal No. 1113 of 1903, dated the 20th November, 1904.

Under section 54 (3) of the Bengal Tenancy Act an "arrear" is an unpaid instalment of rent. It must continue to be an arrear until paid. There is no provision in the Bengal Tenancy Act to the effect that an arrear, if tendered shall cease to be an arrear. But section 61 provides that in the cases mentioned in that section among which is the case of a tender of rent being refused, or having been previously refused, the tenant may deposit his rent in Court and section 62 (*1*) and (*2*) enact that on his so depositing his rent in Court, the Court shall give him a receipt which will operate as an acquittance of the rent paid. An arrear of rent so deposited will then cease to be an arrear. Then, section 67 provides that an arrear, that is, an unpaid instalment of rent, *shall* bear interest at 12 per cent. per annum (now 12½ per cent. per annum in Bengal) up to the date of the institution of the suit. The terms of the section are imperative. Interest at the rate specified *must* be decreed.

[1] (1900) 7 C. W. N., 720.

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Section 67 of the Bengal Tenancy Act made a great change in the law. Under section 21, Act VIII of 1869, an arrear of rent was only "*liable* to interest." This gave the Court a discretion to award interest or not, as it thought fit. No such discretion is allowed by section 67.

In the case of *Jagat Tarini Dasi* v. *Naba Gopal Chaki*,[1] a rule has been laid down that a tender of rent refused by the landlord, if kept good, is sufficient to stop interest running from the date of tender. It has been said that the tender of rent in this case was not kept good, because the tenant is not shown to have been always able and willing to pay the rent and because when tendering each instalment, he did not tender the arrears due for the previous instalments previously refused. In my opinion a tender, even if kept good, as laid down in the case of *Jagat Tarini Dasi* v. *Naba Gopal Chaki* [1] does not stop interest running.

The rule laid down in that case is no doubt an equitable rule, which may be applicable to cases of tender other than that of rent due under the Bengal Tenancy Act, but which would seem to be barred in the case of the tender of rent by the provisions of section 67 of the Bengal Tenancy Act.

But if the rule laid down in the case of *Jagat Tarini Dasi* be applicable to cases of tender of rent, then, it is obvious, I consider that the tender of rent in this case was not kept good for the reasons explained above. I would accordingly decree this appeal, but without costs.

BRETT, J.—The question which has been referred to the Full Bench for decision is whether to stop interest running, a tender of rent, which is improperly refused, must be followed by deposit of the rent in Court under section 61 of the Bengal Tenancy Act, or whether such a tender so refused, if kept good, is sufficient to stop interest running from the date of tender.

The facts of the case are stated in the judgment of the Court of first Appeal to be as follows :—

"The plaintiff tried to enhance the rents of the defendants and other tenants of the mehal but on their refusing to agree to his terms he declined to accept rents from them at the

[1] (1907) I. L. R., 34 Calc., 305.

rates at which they had been paying them all along and instituted these suits and other against the defendants and some other tenants of the mehal at the enhanced rates of rent, but on his failure to prove his right to get them at these rates he had got decrees against some of the tenants at the rates admitted by them, but in these two suits the defendants proved that they tendered the admitted rents to the plaintiff, and that on his refusal to accept them they sent him by money-order, *kist* by *kist*, all the rents as they fell due, but the plaintiffs systematically declined to accept the money, and when these suits were about to be instituted the defendant's pleader again tendered the rents, first to the plaintiff's pleader and then under his instruction to the plaintiff's naib who came to Balpur to institute the suits, and requested them not to institute these suits, but on their declining to accept the money it was deposited in Court before the suits were actually instituted." On these facts the plaintiff's suit against the present respondent was dismissed with costs in both the lower Courts, the Judges of both holding that the plaintiff was not entitled to interst under section 67 of the Act.

A statement of the facts found to be proved seems to me of importance, for the purpose of disposing of this reference, as the answer to the question referred, in my opinion, depends mainly on whether the tender of the rent made by the defendants was a valid tender and whether it was kept good up to the time of the deposit of the rents in Court when the suit was threatened. As I read the judgment of the lower Court it seems to me that the Judge found the facts stated above to be proved, and that the tender was a valid tender, and that it was kept good.

In order to prove that the tender was kept good it was not in my opinion necessary for the defendant to prove that it was repeated in respect of prior instalments as each subsequent instalment fell due and was tendered. It was sufficient to prove that, after tender, each instalment was kept in hand by the defendant ready to be paid to the plaintiff on demand: see *Gyles* v. *Hall*.[1] That this was in fact done appears to be supported by the circumstance, which is found to be proved, that as soon

[1] (1726) 2 P. Wms. 378.

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as the suit was threatened the full rents due were tendered, and, on refusal, were deposited in Court prior to the institution of the suit.

It is not contested on behalf of the appellant that in the case of an ordinary debt the principle is well established that a valid tender, which is kept good, stops the running of interest from the date when the tender is made. Authorities in support of this proposition are discussed in full in the judgment of this Court in the case of *Jagat Tarini Dasi* v. *Naba Gopal Chaki*.[1] The same principle is embodied in section 38 of the Contract Act.

But it has been argued for the appellant that the effect of sections 61 and 67 of the Bengal Tenancy Act is to render that principle inapplicable to the case of a tenant sued for rent, unless the tenant has after the refusal of the tender of his rent deposited it in Court under section 61 of the Bengal Tenancy Act.

This contention does not appear to me to be sound. Section 61 is in my opinion an enabling section, framed for the benefit of the tenant for the purpose of affording him a method by which he may prove beyond dispute the fact of a tender and its refusal. It is not a mandatory section imposing a penalty for failure to comply with its provisions. Nor can it, being a section framed for the tenant's protection, be taken to deprive him of any right which as a debtor he has under the general law.

Under the law as it existed prior to the passing of the Bengal Tenancy Act it was always held that a tenant by proving a valid tender of his rent to his landlord could save himself from liability for interest from the date of the tender: see *Shurut Soonduree Debia* v. *The Collector of Mymensingh*,[2] *Eshan Chunder Roy* v. *Khajah Assanoollah*,[3] *Wooma Churn Sett* v. *Huree Pershad Misser*.[4] It is true that the language in section 21 of Act VIII B. C. of 1869 differs from that in section 67 of the Bengal Tenancy Act, but it does not appear to me that the law has been substantially altered by the later Act. The definition of an arrear involves not merely money unpaid, but unpaid at the due time.

[1] (1907) I. L. R. 34 Calc. 305, 321, 322.
[2] (1866) 5 W. R. (Act X) 96.
[3] (1871) 16 W. R. 79.
[4] (1868) 10 W. R. 101.

Sub-section 3 of section 54 of the Bengal Tenancy Act runs as follows:—"Any instalment or part of an instalment of rent not duly paid at or before the time when it falls due shall be deemed an arrear." Can rent which is tendered with the intention of paying it to the person to whom it is due at the time when it is due but which is without good cause not received by the person to whom it is due and to whom it is tendered, be regarded as an arrear within the meaning of the law? In my opinion it cannot. The term "arrear" involves the existence of some default on the part of the debtor. In the instance before us it has been found that there has been no default by the debtor, who so far as lay in his power has discharged the duty which lay on him to effect a payment. Payment of a debt no doubt requires a tender by the debtor, of the full amount due from him, at the due time and place, to the person to whom it is due, and the acceptance of the same by the latter. If, however, the latter for no good cause refuses to accept the tender of the money or offer to pay, as made in accordance with the law by the debtor, that sum of money cannot afterwards be regarded in law as an arrear for which the debtor is responsible. The findings of the lower Courts appear to me also to amount to this that the tender on each occasion of the rent after it was made by the defendant was kept good, for after its refusal by the plaintiff the money was kept in hand by the defendant ready to be made over to the plaintiff on demand, and when the suit was threatened the full amount so kept in hand was tendered to the plaintiff's agents, and, on their refusal to accept it, was paid into Court.

It has not been suggested in the present case that the tender was not made at the place and to the presons to whom the law requires that it should be made. The effect of a tender not made in compliance with the law does not therefore arise for consideration in this case.

On the facts found in the present case I am of opinion that the tender had on each occasion been made by the defendant and refused by the plaintiff without good cause, and after the tender in each instance had been kept good, the rent so tendered and refused did not constitute an arrear of rent within the meaning of section 67 of the Bengal Tenancy Act so as to carry interest against the defendant after the date of tender. I am also of opinion that on the facts as found it was not necessary

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for the defendant to follow up his tender by a deposit of the rent in Court under the provision of section 61 of the Bengal Tenancy Act in order to stop interest from running under section 67 of the same Act.

I would, therefore, answer the first part of the question referred to us in the negative and the latter part in affirmative.

MITRA, J.—I have no doubt that a landlord is, under the Bengal Tenancy Act, entitled to receive from his tenant interest on arrears of rent, notwithstanding tender of rent by the latter if the tender is not followed by a deposit in Court. This is the view Pratt, J. and I took in *Sremoti Joy Doorga* v. *Srikant Roy*,[1] decided on the 25th November, 1904. We followed *Raja Ransgit Singha* v. *Bhagabutty Charan Roy*,[2] and I see no reason now for taking a contrary view. Sections 54 to 67 of the Act lay down a special law as to contracts between landlord and tenant concerning agricultural lands and indicate that the tenant would not be relieved from his liability to pay interest on arrears unless either the amount is paid to the landlord who is bound to grant a receipt for the same or unless a receipt is granted by the Court in which a deposit is made under section 62 of the Act, such receipt operating as an acquittance as if payment has been made to the true landlord. Section 54, subsection (3) defines an arrear. It is an instalment or part of an instalment of rent not duly paid at or before the time it falls due. Section 67 makes payment of interest on arrears compulsory. I do not think we ought to twist the plain words of the last clause of section 54 and of section 67 of the Act and hold that tender of rent has the same effect with respect to interest as actual payment. Sections 61 and 62 of the Act provide ample means of avoiding liability to pay interest and the hardship that may be caused in some cases by a plain interpretation of the words of sections 54 and 67 is easily removable by the tenant himself. But if the Legislature has expressed its intention in language sufficiently plain, the argument about hardship, even if there be any, can have no weight.

I do not think, however, that it is real hardship on the tenants as a class to compel them to deposit rents and obtain acquittances

[1] (1904) Unreported. [2] (1900) 7 C. W. N. 720.

under sections 61 and 62, if they wish to have the advantage of a tender of rent in the shape of non-liability to pay interest. One of the objects of legislation is to lay down rules for minimising the length of litigation and to render proof of disputed facts easy. The compulsory registration of deeds and the exclusion of oral evidence in certain cases may be cited as instances. The object of sections 61 and 62 of the Bengal Tenancy Act seems to me to be that the tender of rent by a tenant to his landlord to be effective must be followed by a deposit in Court. The relation between a landlord and tenant is generally that between the strong and the weak. Proof of tender and especially valid tender ordinarily involves the introduction of lengthy oral evidence and consideration of nice questions of law, but a deposit in Court following a tender and the grant of a receipt by the Court render under section 62 any other proof unnecessary except the production of a receipt. The rules in the sections about deposit of rent are intended for the benefit of the tenant as well as of the landlord in the same way as compulsory registration of deeds is for the benefit of the grantor as well as the grantee. The object of legislation as to deposit would be frustrated and in most cases to the detriment of the tenant, if the latter was permitted to be involved in the lengthy litigation as to proof of tender. The validity of a tender may be questioned on various grounds as they used to be before the enforcement of the Bengal Tenancy Act. The rules laid down in section 38 of the Indian Contract Act as to an effective offer of performance by the promisor to the promisee incorporate general principles of law and equity, but tenants in the majority of cases would be in hopeless difficulty, if in the state of things that exists in the country, they were required to strictly comply with these rules. Individual cases of hardship must yield to the general policy of law which aims at the greatest good of the greatest number, and that policy appears to me to be easy of ascertainment from the different provisions of the Act.

But the most cogent argument for interpretation in the way sought for by the appellant in this case is afforded by the history of legislation as to payment of interest by the tenant. Before the enactment of Act X of 1859 the awarding of interest in all cases was not the law followed by the Sudder Court: S.D. 1832, p. 508. Interest was allowed by Courts on principles of equity

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and rules of law laid down in Act 32 of 1839, though as a matter of fact the zemindars levied interest in all cases: see also *Kashee Nath Roy Chowdhry* v. *Mynuddeen Chowdhry*.[1] Act X of 1859 laid down that any instalment of rent which is not paid on or before the day when the same is payable be held to be an arrear of rent under the Act, and, unless otherwise provided by written agreement, *shall be liable to interest* at 12 per cent. per annum. The words "*shall be liable to interest*" were construed by this Court in a series of cases and it was held that by using the word "liable" the evident intention of the framers of the Act was to leave the Court a discretionary power of awarding interest or not and as to rate thereof if interest was awarded at all. It was uniformly held that the obligation to award interest and that at 12 per cent. was not absolute: *Beckwith* v. *Kishto Jeebun Buckshee*,[2] *Raja Sattyanand Ghoshal* v. *Zahir Sikdar*.[3]

Radhika Prosunno Chunder v. *Urjoon Majhee*,[4] was a case under Act VIII (B.C.) of 1869 which in section 21 re-enacted in the same words the provisions contained in section 20 of Act X of 1859. The learned Judges who decided it accepted the construction put upon the word "liable" in Act X of 1859. Reliance was placed in argument on the provisions of section 44 of the Act of 1869 which correspond to some extent to section 68 of the Bengal Tenancy Act, as having altered the law and compelled deposit in Court to save interest from running. The learned Judges observed "certainly it does appear from section 44 of the new Act, that it is the duty of the tenant, when the zemindar refuses to receive the amount tendered to him, to pay it into Court, otherwise he renders himself liable to heavy damages; still we cannot come to the conclusion for that reason that the legislature intended when *they used the very same* words as they used in the former Act, to impose upon the tenant to pay as an absolute obligation, interest at 12 per cent. when the rent was not paid. That was held to be so under the former Act, and we ought to hold that it is not so under the present. While this was the state of the law, the Bengal Tenancy Act was passed. This has laid down definite but simpler rules as to deposit of rent by tenants. It has given them every facility to

[1] (1864) 1 W. R. 154.
[2] (1863) 1 Marsh. 278.
[3] (1871) 6 B. L. R. App. 119.
[4] (1873) 20 W. R. 128.

do so. It also has laid down that a receipt granted by the Court would have the same effect as a receipt by the landlord. Then, to avoid the effect of the rulings on the earlier laws, the legislature changed the language used in sections 20 and 21 of the repealed Acts and made payment of interest at 12 per cent. compulsory in all cases until payment or deposit which has the same effect as payment or institution of a suit by using the word "shall" instead of "shall be liable." The obvious intention of the Bengal Tenancy Act was to overrule the old cases, specially *Radhika Prosunno Chunder* v. *Urjoon Majhee*.[1] The discretion left to the revenue Courts under section 20 of Act X of 1859 and to the ordinary Civil Courts under section 21 of Act VIII (B.C.) of 1869 to apply principles of equity in cases of tender of rent was thus taken away by section 67 of the Bengal Tenancy Act. This view of the change effected by section 67 of the Bengal Tenancy Act was adopted in *Raja Ransgit Singha* v. *Bhagabutty Charan Roy*[2] and it is a distinct authority on the question before us. The *ratio decidendi* in that case was not that the tender was bad because it was a tender to an am-mukhtear but that sections 54 to 67 of the Bengal Tenancy Act had made deposit after tender imperative to prevent interest from running.

The operation of section 38 of the Indian Contract Act was obviously restricted in cases between landlord and tenant under the Bengal Tenancy Act, by use of the imperative word "shall" in section 67 of the latter Act. There is no corresponding rule as to payment of interest in the Contract Act, and the special rule must prevail against the general.

Reference has been made in argument to section 84 of the Transfer of Property Act. If section 38 of the Contract Act embraces all cases of the effect of valid tender, section 84 of the Transfer of Property Act was unnecessary. But section 84 following the rules of equity provides a special remedy applicable to mortgages of immovable property. It lays down that interest shall cease on tender, while section 67 of the Bengal Tenancy Act makes interest payable until suit. If the intention of the Legislature in the Bengal Tenaney Act was that a rule similar to that laid down in section 54 of the Transfer of Property Act or similar equitable rules or the rule in the Contract Act would

[1] (1873) 20 W. R. 128. [2] (1900) 7 C. W. N. 720.

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apply to valid tender of rent by a tenant, it would have said so in plain words as it had done only three years before (1882) in the Transfer of Property Act. On the other hand elaborate rules as to deposit of rent and its effect corresponding in some respect to those in section 83 of the Transfer of Property Act were laid down in sections 61 and 62 of the Tenancy Act, but they were not followed by a rule similar to that in section 84 of the former Act, but, were followed by the imperative word "shall" in section 67 as to payment of interest. If any conclusion is to be drawn from section 84 of the Transfer of Property Act, it must be one against the application of either section 38 of the Contract Act or any equitable rule as such as was enacted in section 84.

With the greatest deference to the learned Judges who decided the case of *Jagat Tarini Dasi* v. *Naba Gopal Chaki*[1] it seems to me that rules of law laid down by foreign Courts in cases not governed by codified law such as we have in the Bengal Tenancy Act, rules of equity and justice deducible from judgments of foreign Courts or the opinions of foreign jurists, are very useful only in deciding cases to which no statute law is applicable. As held in *Bank of England* v. *Vagliano*[2] and *Norendra Nath Sircar* v. *Kamalbasini Dasi*,[3] statute law must supersede all rules and principles previously adopted or applied either in this or in other countries. Our first aim should be in cases governed by statute law to ascertain the law as laid down in it, and to apply it whether it causes hardship and if there be ambiguity we should ascertain the intention of its framers by the application of recoguised rules of interpretation. The only way of getting over the plain and unambiguous words of section 67 of the Bengal Tenancy Act lies in interpreting the words "not duly paid" in the last clause of section 54 as including "not duly tendered." But to hold that "valid tender" amounts to payment within the meaning of the clause would, in my opinion, be unduly straining language. I am not aware of any authority for such an interpretation and none was referred to in arguments. A promisor may not be responsible for non-performance after he has made an offer of performance to the promisee if the offer has not been accepted; he may thereby be discharged from liability to perform

[1] (1907) I. L. R. 34 Calc. 305.
[2] (1891) A. C. 107.
[3] (1896) I. L. R. 23 Calc. 563; L. R. 23 I. A. 18.

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his promise. But in the case of payment of rent, the liability to pay continues; the debt is not extinguished. Only the liability to pay interest may cease. Tender of rent cannot, therefore be construed to be payment of rent.

There is, it appears to me, a further reason why we should not introduce the law as to the effect of a tender of an ordinary money debt to the interpretation of the word "paid" in section 54. There is no law in India enabling a debtor to deposit in Court to the credit of his creditor, the amount payable by him as simple money debt. The law does not provide any machinery for the discharge of such a debt by a deposit in Court. The only means the debtor may adopt to avoid liability to pay interest is to tender and tender is very reasonably held to be sufficient to prevent interest from running, on the principle that a man cannot take advantage of his own wrong. The Transfer of Property Act makes a special provision in cases of mortgages of immovable property and it allows by section 83 deposit of mortgage money. But tender of the mortgage money is not a necessary prelude to a deposit. By section 84, tender and deposit are placed in the same footing as to cessation of interest. Section 61 of the Bengal Tenancy Act has made tender a necessary antecedent to a deposit under clause (*a*). The provisions as to tender and deposit and cessation or otherwise of interest on such tender or deposit are not quite harmonious in the two acts passed by the Indian Legislature in the course of three years and the argument from analogy addressed to us based on the similar provisions of the Transfer of Property Act or the equitable rules from which that Act or the Indian Contract Act is drawn appears to me to be quite inapplicable. On the other hand, substantial difference in procedure indicates distinct remedial effects. We cannot, therefore, derive much assistance from either the Contract or Transfer of Property Act in construing the Bengal Tenancy Act.

I, therefore, agree with the Chief Justice in answering the question put to us by the reference.

WOODROFFE, J.—I agree with Mr. Justice Brett.

MOOKERJEE, J.—The question referred for decision to the Full Bench is, whether to stop interest running, a tender of rent which is improperly refused must be followed up by a deposit of rent

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in Court under section 61 of the Bengal Tenancy Act, or whether such a tender, so refused, if kept good, that is, if repeated as each instalment of rent falls due, is sufficient to stop interest running from the date of the tender. It is necessary to point out, at the outset, that the question assumes that a tender of rent is kept good, if it is repeated as each instalment of rent falls due. This however is not so. As was observed by this Court in the case of *Jagat Tarini Dasi* v. *Naba Gopal Chaki* [1] a tender is kept good, if the person who has made the tender is ready and willing at all times after the tender, to pay the debt in current money when requested. The question, therefore, which has to be considered may be stated to be, whether to stop interest running, a tender of rent which is improperly refused, must be followed up by a deposit of rent in Court under section 61 of the Bengal Tenancy Act, or whether such a tender so refused, if kept good, is sufficient to stop interest running from the date of the tender. This matter was fully examined in the case of *Jagat Tarini Dasi* v. *Naba Gopal Chaki*,[1] to the decision in which case I was a party. That case lays down that a valid tender which has been improperly refused but which is kept good, though it does not extinguish the indebtedness, stops the running of interest after the tender. It further lays down that this principle is applicable to the case of rent payable in respect of tenancies to which the provisions of the Bengal Tenancy Act are applicable. After a careful consideration of the arguments which have been addressed to us by the learned vakils on both sides, I adhere to the view which I expressed in that case. It cannot be disputed that the principle that a valid tender which has been improperly refused but which is kept good, though it does not extinguish the indebtedness, stops the running of interest after the tender, is founded on good sense and is supported by cases of the highest authority. So far back as 1726, it was ruled by Lord Chancellor King in *Gyles* v. *Hall* [2] that if a valid tender has been made and improperly refused, and if the person who has made the tender has, from that time, always kept the money ready, interest on the debt ceases; in other words, if the tender be insisted on to stop the interest, the money must be kept dead from that time, because the party is to be *uncore prist*. This was accepted as settled law

[1] (1907) I. L. R. 34 Calc. 305.

[2] (1726) 2. P. Wms. 378.

in *Kinnaird* v. *Trollope*[1] and *Bank of New South Wales* v. *O'Connor*.[2] In the latter case, Lord Macnaghten in delivering the judgment of their Lordships of the Judicial Committee observed that a proper tender will stop the running of interest, if the mortgagor keeps the money ready to pay over to the creditor. The rule is stated in similar terms by Mr. Justice Hunt in *Bissel* v. *Heyward*[3] where in delivering the unanimous opinion of the nine Judges of the Supreme Court of the United States he observed that a valid tender to have the effect of stopping interest must be kept good. The rule, however, is based not merely upon cases of the highest authority, it is founded on justice, equity and good conscience. The liability to pay interest is incurred, because money which was payable has been improperly withheld. But where a debtor, to use the language of Mr. Justice Clifford in *Colby* v. *Reed*[4] has always been ready to perform the contract and did perform it, as far as he was able, by tendering the requisite money, it is difficult to see on what principle he can be made liable for interest, if the complete performance has been prevented by the improper refusal of the creditor to accept the tender. The principle applicable to cases of this description is lucidly explained in Hunt on "Tender," section 363. The improper refusal of a valid tender does not extinguish the indebtedness, but though the debt remains after the tender and refusal, the effect is, when the tender is lawfully made and maintained, to discharge the debtor from the liability for interest subsequent to the tender, and the recovery of interest is barred, whether the rate be stipulated or is fixed by law, and would accrue as damages *ratione detentione debiti*. A refusal of a valid tender of debt or duty, if the tender be kept good, defeats the recovery of damages that would accrue subsequent to the tender by reason of non-payment or non-performance. It was argued however, that although this is unquestionably the general rule, it has no application to cases within the purview of the Bengal Tenancy Act. It was contended that section 67 of the Bengal Tenancy Act makes it obligatory upon Courts of Justice to allow interest on arrears of rent, and that the only method by which a tenant can escape the liability to pay such interest, is to make a deposit under section 61 and to obtain an acquittance

[1] (1889) 42 Ch. D. 610, 616.
[2] (1889) 14 App. Cas. 273, 284.
[3] (1877) 6 Otto. U. S. 580.
[4] (1878) 9 Otto. U. S. 560.

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receipt under section 62. In my opinion, the effect sought to be attributed to these provisions of the Bengal Tenancy Act, is not based upon a reasonable construction of that statute. In the first place, the Bengal Tenancy Act does not purport to be a complete Code, even in respect of the law of landlord and tenant. In the second place, the Bengal Tenancy Act does not profess to incorporate the general principles of the law of contract and the doctrines of equity jurisprudence, in so far as they may have to be applied in the determination of disputes between landlords and tenants. No doubt, section 67 of the Bengal Tenancy Act provides that an arrear of rent shall bear interest at a specified rate, whereas the provision of law which it replaced (section 21 of Act VIII of 1869, B.C.) was more elastic, and laid down that arrears of rent were *liable* to interest at a prescribed rate. But what is the foundation for the suggestion that rent which has been properly tendered and improperly refused, is an arrear on which interest may be levied under section 67 of the Bengal Tenancy Act? It was argued by the learned vakil for the appellant that under section 54, sub-section 3, of the Bengal Tenancy Act, any instalment of rent not duly paid at or before the time when it falls due is to be deemed an arrear, and he observed that this section speaks of "rent not duly paid" and not of "rent duly tendered." The learned vakil for the respondent, on the other hand, contended that the section does not speak of "rent not duly paid and accepted," and suggested that, as rent was duly tendered and improperly refused, it was duly paid within the meaning of the section. If provisions of our Codes are to be construed in the manner suggested, and if distinctions of such nicety are to be drawn, I consider that the answer given by the learned vakil for the respondent has the merit of plausibility. But I prefer to put a reasonable construction upon section 54, and to my mind it is tolerably plain that if rent has been duly tendered before or at the time when it falls due, and the tender has been improperly refused, the rent cannot legitimately be said to be in arrear. The term "arrear" involves a twofold notion, namely, that there is a debt, and that the time for payment of it has expired; in other words, arrear is that which is *behind* in payment or which remains unpaid though due; there is no ambiguity about the word. There must be a debt, and it must also be due, because no payment has been

made : see Oxford Dictionary, vol I, page 459, where the derivative meaning is stated to be "*behind*," that is, an arrear of rent is rent behind or unpaid at the due time ; see also *Wiggin* v. *Knights of Pythias*.[1] To put the matter in another way, rent which has been properly tendered and which has been improperly refused, is rent still due, but it is not strictly rent in arrear, as the tenant was not 'behind' to make payment when the rent fell due. I am unable to hold that the Legislature ever intended that rent which had been properly tendered and improperly refused was to be treated as an arrear upon which it would be obligatory on the Courts to allow interest. Besides, there is nothing in the language of sections 61 and 62 to show that the Legislature has prescribed that in order to escape payment of interest upon rent which has been duly tendered and improperly refused, it is compulsory upon the tenant to follow the procedure laid down in section 61 ; in other words, the provision as to the deposit of rent is merely enabling and not obligatory. This, I think, is reasonably plain from the history of the legislation on the subject. Before section 61 of the Bengal Tenancy Act was placed on the Statute Book, if a tenant made a valid tender of rent which was properly refused he found himself in a position of great difficulty. In a subsequent suit for rent by the landlord, in order to escape the liability to pay interest, the tenant had to prove, first, that he made a valid tender, and secondly that the tender had been kept good. Satisfactory proof of these two circumstances might not always be easy and obvious on the part of the tenant, and upon failure to establish the plea of tender, the landlord would recover interest on the rent due. To afford protection to the tenant, section 61 was embodied in the Bengal Tenancy Act. If a tenant who has made a valid tender of rent which has been improperly refused, makes a deposit as provided in section 61, no question can subsequently arise as to whether the tender has been made, or whether it has been kept good. But if the tenant does not avail himself of the benefit of the provision of section 61 and if he takes the risk of establishing by evidence that the tender was duly made and was subsequently kept good, there is no intelligible reason why he should be in a worse position than he would be in, if he proved a deposit in

[1] (1887) 31 Fed. Rep. 122.

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Court. We ought not to place construction upon the statute the effect of which would be to throw upon the tenant, who has made a valid tender which has been improperly refused and which has been kept good, the burden of additional interest which must accrue between the date of tender and the date of deposit, as also the costs of an application under section 61. It is surprising that section 61 which was unquestionably introduced for the benefit of the tenant should now be sought to be so interpreted that it may be used as an instrument against him. In my opinion, section 61 gives a privilege to the tenant of which he may avail himself, if he chooses. But if he does not make a deposit and proves successfully at the trial in suit for rent that he made a valid tender which was improperly refused and which was kept good, he is entitled to have the claim for interest dismissed precisely as if he had made a deposit under the provisions of the statute. It has been repeatedly held in England that the general doctrine of tender is applicable to cases between landlord and tenant, and that the rules relating to tender are the same in rent as in other contracts: Roscoe's Nisi Prius, 17th Edition, 701; Leake on Contracts, Part IV, Chapter IV; and Foa in Landlord and Tenant, 3rd edition, pages 145, 510. It has not been, and it cannot be, disputed that in this country the doctrine of tender is applicable to all cases between landlords and tenants in respect of tenancies other than those to which the provisions of the Bengal Tenancy Act are applicable. I cannot imagine any good reason why the doctrine should be excluded from operation in cases of tenancies to which the provisions of that Act apply. It was, however, strenuously contended on behalf of the appellant, that this view not only does not give effect to the alteration in the provision for payment of interest made by the Legislature when the Bengal Tenancy Act was passed, but practically destroys the entire effect of the change. It may be conceded that when the provisions of a statute, as to the scope of which there is room for reasonable doubt, have to be construed, reference may legitimately be made to the previous law on the subject, as was done by the Judicial Committee in *Ishuree Persad Narain Singh* v. *Lal Chutterput Singh* [1] and *Brown* v. *McLachlan* [2] and, by this Court, in *Ram Kanai Ghosh* v. *Hari Narayan*

[1] (1842) 3 Moo. I. A. 100, 130; 6 W. R. (P. C.) 27.

[2] (1872) L. R. 4 P. C. 543, 550.

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Singh.[1] The operation, however, may easily be carried too far, and may, in the case of Codification Acts, lead to results which have been condemned in decisions of the highest authority: see the observations of Lord Herschell in *Bank of England* v. *Vagliano*[2] and of Lord Macnaghten in *Narendra Nath Sircar* v. *Kamal Basini Dasi*.[3] The proper course is, in the first instance, to examine the language of the statute, to interpret it, to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law. This I have done, and my conclusion is that the contention of the appellant that the provisions of section 61 as to deposit, though they are in form expressly permissive were intended to be obligatory, seeks to force upon the plain language of the section, an interpretation which the words will not bear, except in the light of a supposed policy assumed to be indicated by the history of the legislation on the subject. To begin with an examination of the previous state of the law on the point, is in my opinion, to attack the problem at the wrong end. I do not see, however, that the history of the legislation on the subject does really assist the appellant. What is that history? Under the law as it stood before Act X of 1859, it was ruled by a Full Bench of the Sudder Court in *Neel Kunt Banerjee* v. *Birjo Chunder Banerjea*[4] that where there is a contract for payment of interest upon rent in arrear, interest must be allowed, but in the absence of such an agreement, the Courts were to exercise the discretion vested in them by the Interest Act, XXXII of 1839. In Act X of 1859, by section 20, an arrear of rent was made liable to interest at 12 per cent. per annum, unless it was otherwise provided by written agreement. Act VI of 1862 (B.C.), which amended Act X of 1859, provided by section 4 that the tenant might tender the rent to his landlord, upon his refusal to receive the amount, deposit the same with the Collector, such deposit to have the same effect as payment. When Act X of 1859 was repealed by Act VIII of 1869, B.C., these provisions were reproduced in sections 21 and 46 of the new statute. Under section 20 of Act X of 1859, and section 21 of Act VIII of 1869, B.C., it was

[1] (1905) 3 C. L. J., 546, 553.
[2] (1891) A. C. 107.
[3] (1896) I. L. R., 23 Calc., 563; L. R. 23 I. A. 18.
[4] (1852) S. D. A. 508; Savestre 143.

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repeatedly ruled by our Courts, that they had a discretion as to whether interest was to be allowed, and if so, at what rate. Most of the cases in the books however, are very imperfectly reported, and it cannot be ascertained, upon what precise ground, interest was disallowed in any particular case. But it is quite clear that *Kashee Nath Roy Chowdhry* v. *Mynuddin Chowdhry*,[1] was a case, not of tender, but of a deposit in the Collectorate before Act VI of 1882, B.C., came into force. The cases of *Beckwith* v. *Kishto Jeebun Buckshee*,[2] *Raja Sattyanand Ghosal* v. *Zahir Sikdar*,[3] were not cases of tender at all, while it is more than doubtful whether the case of *Radhika Prosunno Chunder* v. *Urjoon Majhee*,[4] upon which so much reliance is placed, really involved any question of valid tender. The cases of *Shunt Soondaree Debia*, v. *The Collector of Mymensingh*,[5] *Wooma Churn Sett* v. *Huree Pershad Misser*,[6] *Eshan Chunder Roy* v. *Assanoolah*,[7] undoubtedly affirmed the principle, that interest could not be claimed, if a valid tender of rent had been improperly refused; but there is nothing to indicate, that this conclusion was founded on the ground, that, as the Court had a discretion in the matter, the discretion ought to be exercised in favour of the tenant. The judgments are perfectly consistent with the view, that as rent had been tendered, there was strictly no "arrear" due upon which interest could accrue. It may further be pointed out, that of the three cases last mentioned, the only one in which interest was disallowed, was that of *Wooma Churn Sett* v. *Huree Pershad Misser*,[6] in which a valid tender was established, while in the other two cases, interest was decreed, because the tender alleged was not proved. The majority of cases, therefore, did not relate to the effect of tender of rent, but only to the exercise of judicial discretion by the Court to refuse or reduce interest: *Inderjit* v. *Khaja Abdul Hossain*,[8] *Ramshunkur* v. *Ishian Chunder*,[9] *Fuseebun* v. *Ashrufoonnissa*,[10] *Mahtab Chand* v. *Deb Kumari Debi*,[11] *Johoory Lall* v. *Bullab Lall*.[12] Reference may, however, be made

[1] (1864) 1 W. R. 154.
[2] (1863) 1 Marsh. 278; 2 Hay 286.
[3] (1871) 6 B. L. R. App. 119.
[4] (1873) 20 W. R. 128.
[5] (1866) 5 W. R. (Act X) 69.
[6] (1868) 10 W. R. 101.
[7] (1871) 16 W. R. 79.
[8] (1864) 2 Rent Rulings 210.
[9] (1863) Sevestre 138.
[10] (1875) 23 W. R. 463.
[11] (1871) 7 B. L. R. App. 26.
[12] (1879) I. L. R. 5 Calc. 102.

to *Bissonath Deb* v. *Hurro Pershaud Chowdhery*,[1] in which a question was raised analogous to the one now before this Court. There the question arose as to the effect of section 4 of Act VI of 1862, B.C., which allowed the tenant to make a deposit in the Collectorate upon refusal of a valid tender made by him, and provided that such deposit would in all respects operate as and have the full effect of a payment. With reference to this provision, it was ruled in the case to which I have just referred, that, although a tenant may escape liability to pay interest upon tender followed by deposit in Court, the law does not forbid the Court to advert or give effect to a tender not followed by a deposit or payment into Court. This case, therefore, laid down that section 4 of Act VI of 1862, B.C., which was subsequently reproduced as section 46 of Act VIII of 1869, B.C., was, as its very language shewed, merely enabling and not mandatory. Now, what did the Legislature do, when the Bengal Tenancy Act was passed, with the decision of *Bissonath Deb* v. *Hurro Pershaud Chowdhery*,[1] before them? They framed section 61 which corresponds to section 46 of Act VIII of 1869, as still permissive; if they intended to make the section obligatory, the object might have been attended with the utmost ease by the use of appropriate language, and section 62 might have been so worded, as to make it evident, that the only way to escape payment of interest is to tender the rent and then deposit the same in Court. Under these circumstances, a reference to section 67, does not, with all respect, seem to be quite relevant; it is undoubtedly not conclusive upon the question raised. It appears to me to be incontestable that the effect of the alteration in the provision as to interest was to take away the discretion formerly vested in the Courts, but that this does not, in any way, affect the case of tender; when a valid tender is established, and it is proved to have been kept good, the matter is beyond the domain of the discretion of the Court, the tenant is entitled to claim as a matter of right, that interest should be refused. The law under the Acts of 1862 and 1869 unquestionably was, that the tenant could successfully assert this claim to exemption, even though his tender was not followed by deposit; the tender was essential: the deposit optional. The language of the present Act, to my mind, shows plainly, that the law in this respect

[1] (1865) 2 W. R. (Act X) 88.

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has not been altered. A review then of the history of Legislation on this subject, not only does not lend any support to the contention of the appellant, but seems to me to destroy it most effectively. What then is the position of the parties? The Bengal Tenancy Act in this matter is not exhaustive; the provisions of section 61 are merely permissive. How does a Code, then, which is neither complete nor very explicit, exclude the application of the broad principles of justice, equity and good conscience, according to which Courts in this country are bound to act under section 37 of Act XII of 1887, and according to which they have always acted since section 21 of Regulation III of 1793 was passed? That these rules of equity, justice and good conscience are deducible from judgments of foreign Courts or have met with the approbation of foreign jurists, does not take away from their value or throw any discredit on them. A recourse to the first principle of jurisprudence, may occasionally be useful in the administration of the law as contained in even an Indian Code, and it is too late now to discard them after their Lordships of the Judicial Committee have interpreted "equity and good conscience" to mean the rules of English law, if found applicable to Indian society and circumstances: *Waghela Rajsanji* v. *Shekh Masludin*,[1] *Doda Honaji* v. *Babaji Jagushet*,[2] *Waman Ramchandra* v. *Dhondiba Krishnaji*.[3] On these grounds I am not prepared to disregard the principles of justice, equity and good conscience in the case before us, and in the absence of express legislative provision excluding the application of the doctrine of tender to cases governed by the Bengal Tenancy Act, I must decline to put upon the statute a construction which leads to manifest injustice, and which I am satisfied was never intended by the Legislature. My answer, therefore, to the question proposed for decision by the Full Bench, modified as I have indicated, is as to the first part in the negative, and as to the second part, in the affirmative, in other words, that if a valid tender has been made and improperly refused, it is not obligatory upon the tenant to follow up the tender by a deposit in Court under section 61; if the tender is kept good, it is sufficient to stop interest from the date of the tender.

[1] (1887) I. L. R. 11 Bom. 551; L. R. 14 I. A. 89, 96.

[2] (1865) 2 Bom. H. C. 38.

[3] (1879) I. L. R. 4 Bom. 126.

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As regards the facts of the particular case which is now before us, at one stage of the hearing of the appeal, I was inclined to the view that the facts found by the Subordinate Judge were not sufficient to show that the tender was kept good. In the course of the able argument, however, which was addressed to us by the learned vakil for the respondent, he has, I think, shown that a different interpretation is possible. It is true that the Subordinate Judge does not state expressly in so many words that the tender was kept good. But he has found that the rent due was tendered to the plaintiff, that on his refusal to accept the amount tendered it was sent by money order, instalment by instalment, as it fell due, that even up to the date on which the suit was instituted, the defendant tendered money which was not accepted, and that when the suit was about to be instituted, the pleader for the defendant again tendered the rent, first, to the pleader for the plaintiff and then to his Naib, but as they declined to accept the money, it was deposited in Court before the suit was actually commenced. From all these facts, the inference does seem to be legitimate that the defendant made a valid tender, and was always ready and willing to pay the money, if only the plaintiff expressed his willingness to accept it. It was in substance a continuous tender which was kept open by a continuing readiness, not a mere willingness, to pay to the landlord. The facts found by the Subordinate Judge may, therefore, be taken as equivalent to a finding that the tender was kept good. If so, in the view I take of the law on the subject, the claim for interest cannot be sustained, and the suit has been rightly dismissed by the Courts below. This conclusion, I may add, is consistent with the manifest justice of the case ; upon the facts disclosed, there cannot be the remotest doubt that the plaintiff repeatedly refused valid tenders of rent, solely with a view to harass the defendant, and to put pressure upon him so as to force him to consent to an enhancement of rent. If there is any case in which the plea of the tender ought to be applied and allowed, the case before us is eminently of that description. In my opinion, there are no merits in the appeal and it ought to be dismissed with costs.

Appeal dismissed.

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NOTE.

The law as to tender is stated in Sec. 38 of the Indian Contract Act. The law considers a party who has entered into a contract to deliver goods or pay money to another as having substantially performed it, if he has tendered the goods or money to the party to whom the delivery or payment was to be made, provided only that the tender has been made under such circumstances that the party to whom it has been made has had a reasonable opportunity of examining the goods or the money tendered, in order to ascertain that the thing tendered really was what it purports to be. *Startup* v. *Macdonald*, 5 Man. and Gr. 593 (610) ; 64 R.R. 810 (824) per Rolfe B.

A creditor is not bound to accept a cheque ; but if a cheque is tendered and received, and the creditor or his agent objects only to the amount, or makes no immediate objection at all, he cannot afterwards object to the nature of the tender. *Bolye* v. *Moreland*, I.L.R. 4 Calc. 572.

When a debtor tenders payment to his creditor but the latter refuses to accept, the debt is not discharged, but interest ceases to run from the date of tender, provided the tender is valid in law. But though in theory the debt is protected, in practice he may be, and often is, deprived of this protection by his inability to prove tender, the onus of proof being on him. The legislature to obviate the debtor's difficulty authorised the tenant in Sec. 61 of the Bengal Tenancy Act and the mortgagor in Sec. 83 of the Transfer of Property Act to deposit the amount in Court. But in the case of ordinary debtor, he cannot deposit the amount in Court.

At page 18 of the Leading Case Mr. Justice Mookerjee says " The term 'arrear' involves a twofold notion, namely, that there is a debt, and that the time for payment of it has expired." Thus in the Revenue Sale Law, *arrear of revenue* is defined in Sec. 2 and the latest day of payment is fixed in Sec. 3. If the arrear is not paid before the sun-set of the latest day, the estate will be sold. Sec. 54 of Sub-Sec. (3) of the Bengal Tenancy Act defines an arrear and times for payment are laid down in Sec. 53.

Present : LORD SHAW OF DUNFERMLINE, LORD MOULTON, and MR. AMEER ALI.

ARTHUR HENRY FORBES

v.

BAHADUR SINGH AND OTHERS.

[*Reported in L. R. 41 I. A. 9 ; I. L. R. 41 Calc. 926 P. C. ; 18 C. W. N. 747 P. C. ; 25 C. L. J. 434.*]

1913.
Dec. 3, 4.
1914.
March 4.

The facts giving rise to the litigation were shortly as follows. Rai Dhanpat Singh, the father of the first respondent, was the zamindar of Lot Saifganj, a patni taluq of which Chattrapat Singh (a defendant and the fifth respondent) had been patnidar. Chattrapat Singh had created various darpatni tenures of which the appellant held two.

On June 27, 1893, Rai Dhanpat Singh sold and conveyed his right in the zamindari to Bhagwanbati Chowdhrain. On September 21, 1823, he instituted a suit against Chattrapat Singh to recover arrears of rent due to him for a period prior to the sale, and on July 10, 1896, he obtained a decree for the amount claimed.

On July 19, 1896, Rai Dhanpat Singh executed a deed of trust in favour of his son, the first respondent, appointing the respondents Nos. 2 to 4 the trustees, and, among other properties, assigned to them the above-mentioned decree. In 1897 the trustees applied for execution of the decree against Chattrapat Singh by attachment and sale of his patni tenure. Various objections were raised to the proceedings by the judgment-debtor, but on March 20, 1899, the High Court decided in favour of the trustees as to their right to execution. In the meantime Chattrapat Singh having made default in the payment of the rent of his patni to Bhagwanbati Chowdhrain, the purchaser of the zamindari, she took proceedings under Regulation VIII of 1819 before the Collector of Purneah, and the patni was advertised for sale thereunder. The appellant as darpatnidar applied to the Collector on May 14, 1900, for leave to deposit the amount of the arrears and did deposit the amount under s. 13 of the Regulation.

J. C. 1914.

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On May 23, 1900, the Collector made an order directing the appellant to be put in possession of the patni taluq under s. 13, sub-s. 4, of the Regulation, and on May 30 the appellant was put into possession and had since remained in possession. At the date of the suit there was due to the appellant a large sum in respect of this deposit.

Subsequently to the appellant being put into possession of the patni taluq the trustees, respondents Nos. 2 to 4, applied for execution of the decree which they had obtained on July 10, 1896; they advertised the patni taluq for sale under s. 163 of the Bengal Tenancy Act (Act VIII of 1885), and afterwards obtained an order for a sale proclamation under s. 165 of that Act.

On July 9, 1906, the appellant instituted the present suit praying (1) for a declaration that the decree of July 10, 1896, was not a rent decree within the meaning of the Bengal Tenancy Act, and that the patni tenure could not be sold in execution thereof, (2) for a declaration that he had a first charge on the tenure in priority to all others which might have existed previously to May 14, 1900, and that the tenure could not be sold in execution free from that charge and (3) for an injunction.

The judgment of their Lordships was delivered by

Mr. Ameer Ali.—This appeal, which is from a judgment and decree of the High Court of Calcutta, dated April 8, 1908, raises certain questions of particular importance under the Rent Law of Bengal, for the proper apprehension of which it is necessary to set out in some detail the facts of the case.

The zamindari of Lot Saifganj, situated in the district of Purneah, was owned at one time by a zamindar of the name of Roy Dhanpat Singh, since deceased. The estate, however, was settled in patni, and has been held for some years past by the defendant Chattrapat Singh as the patni taluqdar; Chattrapat, on his side, settled the patni tenure, in several parcels with subordinate tenure-holders called darpatnidars. Two of these darpatnis are held by the plaintiff-appellant. These tenures are special to Bengal, the Sonthal Pergunas, and certain parts of Chota-Nagpur, and their incidents are governed by Regulation VIII of 1819, commonly called the Patni Regulation. To

some of these incidents reference will be made in the course of this judgment.

It may be conveniently premised here that a patni taluk is a permanent heritable and transferable tenure, which the zamindar may create over the whole or part of his estate, whilst the patni taluqdar has a similar right to let the entire property held by him in patni or in parcels to subordinate taluqdars called darpatnidars. And this process of sub-infeudation may, so far as the law is concerned, be carried down to several lower degrees. In the case of these tenures the zamindar has a right to apply to the Collector to put up the patni taluq to sale for arrears of rent, and the sale has the effect of cancelling all under-tenures; but the subordinate tenure-holders have the right to deposit in the Collector's Court the arrears of rent, and to be put in possession of the defaulting superior tenure for the satisfaction of the deposit made by them. The same right which the zamindar possesses for the realization of his rent, with the correlative right on the part of the subordinate tenure-holders of saving the superior tenure from sale, is given to them in succession.

On June 27, 1893, Dhanpat Singh transferred the zamindari, subject of course to Chattrapat's patni, to a Hindu lady, Bhagwanbati Chowdhrain, who has unquestionably been in possession of the estate since her purchase.

It appears that certain arrears of rent in respect of the patni had become due before the sale to Bhagwanbati Chowdhrain. For these arrears Dhanpat Singh brought a suit in the Civil Court on September 21, 1893. The final decree in this action was passed by the High Court on July 10, 1896. Nine days after Dhanpat Singh executed a deed of trust by which he assigned to the defendants 2 to 4 in trust for the defendant Maharaj among other properties the decree for arrears of rent. Dhanpat Singh died shortly after, leaving Maharaj his only son and heir. In 1897 the trustees proceeded to execute the decree against Chattrapat, but were met with various objections on his part which were finally overruled by the High Court in 1899.

In the meantime Chattrapat had fallen into arrears in respect of the patni rent payable to the Chowdhrain; and that lady had instituted in the Court of the Collector of Purneah the special proceedings under Regulation VIII of 1819 for the realization of

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her dues. The defaulting tenure was accordingly advertised for sale on May 14, 1901. The plaintiff-appellant thereupon deposited the amount of the arrears in the Collector's Court and was put by him in possession of the patni taluq. Since then he has been and still is in possession of the superior tenure, paying rent to the zamindar and realizing the rents due to the patni taluqdar from the subordinate holders.

The trustee defendants, having obtained the decision of the High Court that they were entitled to execute Dhanpat Singh's decree, applied for the sale of the patni taluq under s. 163 of the Bengal Tenancy Act. It is to be observed that a sale held under this section does not give power to the decree-holder to annul "notified and registered incumbrances." The plaintiff thereupon preferred a claim under s. 278 of the Civil Procedure Code, 1882, which, however, after some protracted proceedings, was withdrawn. Apparently a sale under s. 163 was held, but it did not fetch a sum sufficient to liquidate the arrears and costs, and the defendants then applied for a sale under s. 165, under which the decree-holder has the power to annul all incumbrances including under-tenures. On this application August 6, 1906, was fixed for the sale of the patni. The present suit was then brought by the plaintiff on July 9, 1906, in the Court of the Subordinate Judge of Purneah to restrain the defendants from proceeding with the sale.

It should be noted here that there exist many permanent, heritable, and transferable tenures in Bengal which do not come within the purview of Regulation VIII of 1819, and which have no relation to patni taluqs. The incidents of these tenures are governed by the Bengal Tenancy Act passed in 1885, to regulate, subject to certain exceptions to which attention will be drawn, the relations in general between landlord and tenant.

The Bengal Tenancy Act, 1885, whilst it protected the permanent [tenure-holder and other tenants having similar permanent interests against ejectment for arrears of rent, gave to the landlords certain rights which they either did not possess before or possessed only in a qualified form. One was the right to bring to sale the tenure or holding in execution of a decree for arrears of rent. Sect. 65, which declares this liability of the defaulting tenure, also declares that "the rent shall be a first

charge thereon." It is round these words that the controversy between the parties is mainly centred. Their Lordships say mainly, because there is another question of vital importance in this case which relates to the applicability of the provisions of the Bengal Tenancy Act to patni tenures.

The defendants in their endeavours to bring Chattrapat's patni taluq under the provisions of s. 165 of the Tenancy Act contend that, as the relationship of landlord and tenant existed between Dhanpat Singh and Chattrapat when the rents became due, the decree obtained by him became by virtue of s. 65 a first charge on the tenure. The plaintiff's contention, on the other hand, is that as Dhanpat Singh had parted with his interest in the zamindari before the institution of his suit for arrears, the decree of which execution was sought was not a rent decree within the meaning of s. 65.

The Subordinate Judge has upheld the plaintiff's contention, and granted him an injunction restraining Maharaj Bahadur and the trustee defendants, who are called in the suit, "first party defendants" from executing their decree of July 10, 1896, against the patni under the provisions of the Bengal Tenancy Act. His decision has been reversed by the High Court on appeal and the plaintiff's suit been dismissed with costs. The learned judges considered that, the decree being for rent, the mere fact that the zamindar had sold the estate after it became due does not affect his right to "a first charge." At least that is what their Lordships understand to be the meaning of the learned judges in the following passage of their judgment: "The decree of the 10th July, 1896, is a decree for rent. Rai Dhanpat Singh was the landlord at the time when the rent he sued for accrued due. His claim for rent, when found due, became a 'first charge' on the patni. There is nothing in the law which disentitles him to a first charge, because after the accrual of the rents he sued for, he parted with his interest of the zamindari." The conception is further developed at a later stage of their judgmert, where they say as follows: "Now, no doubt, the decision of this Full Bench does not deal with a case such as the present in which the landlord had parted with his interest before he instituted his suit for rent, but it would seem to follow that if he can execute a decree for arrears of rent as a rent decree after he

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has parted with interest as landlord, he can also do so when he obtained his decree for rent, even after he had parted with his interest in the property. The character of the decree a suitor obtains depends on the nature of the claim and of his right to the relief sought for, and is not altered by any changes in his position which may have taken place subsequent to the accrual of his right to sue."

Their Lordships cannot help observing that the learned judges have fallen into an error in drawing an inference of law in support of their conclusion from a decision which was obviously based on facts different from those with which they had to deal. In the Full Bench case of *Khetra Pal Singh* v. *Kritarthamoyi Dassi* [1] the landlord did not part with the property and put an end to the relationship of landlord and tenant until after the decree in his suit for rent, whereas in the present case he transferred his interest to Bhagwanbati Chowdhrain before his suit for the arrears. The broad question, however, for determination in this appeal is whether the special right created in favour of the landlord under s. 65 can be claimed also by one who has parted with the property which gives the right and to which it is attached.

There is no doubt that there is a divergence of the opinion among the judges of the High Court of Calcutta with regard to the construction of s. 65. The section itself runs as follows: "Where a tenant is a permanent tenure-holder, a raiyat holding at fixed rates or an occupancy raiyat, he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon." It is not a happily-worded section, and the words "and the rent shall be a first charge thereon" seem, from their collocation, to have been inserted as an after-thought without sufficient consideration of their applicability to the rest of the provisions contained in the section. They give no indication as to when it becomes a "first charge." Does it become a first charge from the nature of the claim, as some of the learned judges seem to imagine, or does it become a first charge after it has been ascertained and made the subject of a decree? Again, the section does

[1] I. L. R. 33 Calc. 566.

not sufficiently indicate at whose instance the tenure or holding shall be liable to sale in execution of a decree for rent thereof, though from the reason of the thing it is obvious that it must be at the instance of the landlord.

These questions cannot, therefore, be answered merely by a reference to the section itself ; to understand its meaning, their Lordships apprehend, the general scope of the statute, as well as of the chapter in which it occurs, must be taken into consideration. The Act, as stated in the preamble, was designed "to amend and consolidate certain enactments relating to the law of landlord and tenant." The words "tenant," "landlord," and "rent" are carefully defined. "Landlord" is declared to mean "a person immediately under whom a tenant holds, and includes the Government," whilst "rent" is declared to mean "whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by tenant." Chapter VIII embodies the "general provisions as to rent." After dealing with "rules and presumptions as to amount of rent," "the alteration of the rent," "the payment of rent," "receipts and accounts," "deposit of rent" in Court when the landlord refuses to receive payment, it treats of "arrears of rent." The governing idea throughout the multifarious provisions contained in Chapter VIII to regulate the respective rights and obligations of landlords and tenants is the subsistence of the relationship that gives rise to those rights and obligations.

Sect. 65 declares that a certain class of tenants shall not be liable to ejectment for "arrears of rent" but that their tenure or holding "shall be liable to sale in execution of a decree for the rent thereof." Sect. 66 provides that in the case of other tenants, not coming within the purview of s. 65, the landlord "may institute a suit to eject" the defaulting tenant. The two sections taken together cover practically the remedies provided by law for the landlord to recover arrears of rent. One section is the exact corollary of the other. The right to proceed to sale in one case, in the other to eject, is dependent on the existence of the relationship of landlord and tenant at the time when the remedy provided by law is sought to be enforced. A reference to s. 148, clause (*h*), clearly shews that the right to apply for the

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execution of a decree for arrears was attached to the status of the decree-holder *qua* landlord. It declares that "notwithstanding anything contained in s. 232 of the Civil Procedure Code an application for the execution of a decree for arrears obtained by a landlord shall not be made by an assignee of the decree unless the landlord's interest has become and is vested in him."

The prohibition contained in this section refers to decrees obtained by the landlord under s. 65. To acquire the right which the section gives, not only the person obtaining the decree must be the landlord at the time, but the person seeking to execute it by sale of the tenure must have the landlord's interest "vested" in him. In other words, the right to bring the tenure or holding, as the case may be, to sale exists so long as the relationship of landlord and tenant exists.

It seems to their Lordships clear on an examination of the different sections bearing on the subject that the right to bring the tenure or holding to sale under s. 65 appertains exclusively to the landlord; and that a person to whom certain rents are due, and who obtains a decree therefor after he has parted with the property in which the tenancy is situate, has no such right. The contrary view, their Lordships think, would give rise to a very anomalous situation. A zamindar to whom certain arrears are due, as in the present case, may sell his property without assigning the back rents, as he is entitled to do; he may then sue for those back rents; before any decree is made in this suit, the tenant falls into arrears to the new landlord who brings a similar suit. Both the ex-landlord and the present landlord obtain decrees for their respective arrears. In whose decree and on whose application is the tenure to be sold? The question admits of only one answer—that it is the existing landlord alone who can execute the decree; the ex-landlord is an outsider, and whilst he can execute his decree against the debtor as a money decree, he has no remedy against the tenure itself.

The learned judges of the High Court seem to think that either from the nature of the debt being arrears of rent, or the decree being for arrears of rent, the tenure becomes *ipso facto* hypothecated so to speak for the debt; and that consequently the person to whom the debt is due, although he has ceased to

be the landlord, and is to all intents and purposes, so far as other rights and obligations under the law are concerned, a total stranger to the property with which those rights and obligations are inseparably connected, has the special remedy given to the landlord to recover arrears attached to the tenure. This conception of the legal position seems to their Lordships untenable, for the change created by s. 65 is clearly in favour of the landlord.

There is another equally fatal objection to the application of the contesting defendants to bring to sale the patni tenure in execution of Dhanpat Singh's decree.

The Patni Regulation is self-contained statute. It lays down certain well-defined rules for the realization by the zamindar of arrears of rent from a tenure-holder; it makes the tenure primarily liable, and it gives to the zamindar the right of applying to the Collector for the periodical sale of defaulting taluqs. Sect. 8 provides for the manner in which the zamindar, that is "the proprietor under direct engagement to Government," shall be entitled to apply for the sale of these tenures. Sect. 11 declares that "any taluq or saleable tenure that may be disposed of at a public sale, under the rules of this Regulation, for arrears of rent due on account of it, is sold free of all incumbrances that may have accrued upon it by act of the defaulting proprietor, his representatives, or assignees." It is unnecessary to refer to the rest of this section for the purposes of this judgment. Sect. 13 provides the method by which the holder of a taluq of the second degree may save his tenure from the ruin that must attend the sale of the superior tenure. Sub-s. 2 declares: "Whenever the tenure of a taluqdar of the first degree may be advertised for sale in the manner required by the second and third clauses of section 8 of this Regulation, for arrears of rent due to the zamindar, the taluqdars of the second degree, or any number of them, shall be entitled to stay the final sale, by paying into Court the amount of balance that may be declared due by the person attending on the part of the zamindar on the day appointed for sale; in like manner they shall be entitled to lodge money antecedently, for the purpose of eventually answering any demand that may remain due on the day fixed for the sale, and, should the amount lodged be sufficient, the

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sale shall not proceed, but, after making good to the zamindar the amount of his demand, any excess shall be paid back to the person or persons who may have lodged it.

Sub-s. 4, after referring to certain conditions which it is unnecessary to consider here, declares that "such deposit shall not be carried to credit in, or set against, future demands for rent, but shall be considered as a loan made to the proprietor of the tenure preserved from sale by such means, and the taluq so preserved shall be the security to the person or persons making the advance, who shall be considered to have a lien thereupon, in the same manner as if the loan had been made upon mortgage; and he or they shall be entitled, on applying for the same, to obtain immediate possession of the tenure of the defaulter, in order to recover the amount so advanced from any profits belonging thereto."

It will be seen, therefore, that the appellant in this case, by his admitted deposit of the arrears for which the superior tenure was advertised for sale at the instance of the Chowdhrain zamindar, acquired the special lien expressly created by the Regulation which may well be called a statutory salvage lien arising not from any implication of the law but under the express directions and declarations of the Act.

Regulation VIII of 1819 being thus, as already observed, a self-contained Act, embodying the rules relative to the rights of zamindars and patni taluqdars, the Legislature in enacting Act VIII of 1885 excluded in express terms from the operation of the Tenancy Act the special legislation relating to patni tenures. Sect. 195 of Act VIII of 1885 declares (omitting the immaterial portions) that "nothing in this Act shall affect..... any enactment relating to patni tenures, so far as it relates to those tenures." The plaintiff's right to hold the patni taluq exempt from any proceeding under the Tenancy Act is founded on steps taken by him under the Patni Regulation.

For these considerations their Lordships are of opinion that the judgment and decree of the High Court should be set aside, and the decree of the Subordinate Judge restored. The first party defendants, the contesting respondents, must pay the costs of this appeal and of the appeal to the High Court. Their Lordships will humbly advise His Majesty accordingly.

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NOTE.

The right to bring the tenure or holding, as the case may be, to sale exists so long as the relationship of landlord and tenant exists. Thus a suit by a ticcadar after the expiration of his lease against a tenant for the recovery of arrears of rent which had fallen due during the pendency of his lease cannot sell the property under the Bengal Tenancy Act, when the landlord in possession got a decree for arrears of rent which fell due after the termination of the lease. *Srimant* v. *Mahadeo*, I.L.R. 31 Calc. 550 ; 8 C. W. N. 531. So where a landlord, after having obtained a decree for rent against a saleable under-tenure, loses his estate, cannot bring the tenure to sale in execution of a decree for arrears. *Hem* v. *Mon Mohini*, 3 C. W. N. 604.

A landlord cannot execute a decree for rent against a tenure which has passed into the hands of a person entitled to hold the same free, not only from incumbrances, but also from rent charge under a decree for arrears of any antecedent period. *Ram Chunder* v. *Samir*, I. L. R. 20 Calc. 25 ; *Faiz Rahman* v. *Ramsukh*, I. L. R. 21 Calc. 169 ; 169 ; *Basant* v. *Khulna Loan Co.*, 20 C. L. J. 1 ; 19 C. W N. 1001. Such a decree is of a peculiar character. It is in one sense a money decree inasmuch as the landlord is not restricted to his remedies by sale of the defaulting tenure ; he is also entitled to proceed personally against the judgment-debtor. *Basant* v. *Khulna Loan Co*, 20 C. L. J. 1 ; 19 C. W. N. 1001.

If a sale of a patni tenure takes place under the Patni Regulation, the landlord is entitled in the first place to appropriate sufficient portion of sale proceeds in deposit with the Collector, n sat sfaction of his decree for rent for previous balances, before a mortgagee can proceed to realize his dues. *Basant* v. *Khulna Loan Co.*, 20 C. L. J. 1 ; 19 C. W. N. 1001.

When a landlord has taken a mortgage of a tenant's holding, he cannot bring it to sale subject to his mortgage : *Rai Ramani* v. *Surendra*, 1 C W.N. 80.

Decrees for arrears of rent obtained against a Hindu widow, and put into execution after her death, cannot be regarded as other than personal debts, payment of which can be enforced only against the property left by the widow. *Krishna Govinda* v. *Hem*, I. L. R. 16 Calc. 511.

But it has been held that where the decree-holder continued to be the sole landlord at the date of the application for execution of the decree for rent, and in his character as landlord decree-holder, took the necessary steps for sale of the under-tenure in conformity with the statutory provisions, the effect of the execution sale is to pass the under-tenure to the purchaser, even though the decree-holder has lost his interest as landlord before the actual sale : *Syedunnessa Khatun* v. *Amiruddi*, 25 C. L. J. 629 ; 21 C. W. N. 847 ; *Manindra* v. *Asutosh*, 25 C. L. J. 626.

Present : LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, SIR JOHN EDGE, and MR. AMEER ALI.

SECRETARY OF STATE FOR INDIA

v.

KIRTIBAS BHUPATI HARICHANDAN MAHAPATRA.

[*Reported in I.L.R. 42 Calc. 710 P. C.; L. R. 42 I.A. 30; 21 C.L.J. 31 P.C; 19 C. W. N. 65 P.C.*]

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June, 23, 24; *Oct. 21.*

The defendant was the appellant to His Majesty in Council.

The principal question for determination in these appeals was as to whether the lands in dispute were chaukidari chakran lands within the meaning of the Village Chaukidari Act (Bengal Act VI of 1870), and were as such validly assessed with revenue by the Collector and transferred by him to the respondents under section 48 of that Act.

In appeal 90 the respondent was the zamindar of Killa Sukinda, a large estate in the portion of Orissa known as the Moghulbandi, a cultivated tract which had been conquered by the Moghuls in 1580. Up to 1833 Midnapur was the only district of Orissa under British rule. The other portion was under the Mahratta rule until October 1803, when the whole of the province now known as Orissa, came under the British occupation and Government; and on behalf of the East India Company, Colonel Harcourt and Mr. Melville, a Civil Officer, were appointed Commissioners to settle the affairs of the province. In pursuance of this settlement *kaulnamas* (engagements in the nature of treaties) were, on 22nd November, 1803, entered into by the Commissioners with certain Khandaits or Feudatory Rajas, the holders of the largest and most important estates in Orissa, thus rendering them of semi-independent status.

In the suit which gave rise to appeal 90 of 1913, the zamindar of Sukinda based some of his claims and contentions on the allegation that he held under a *kaulnama* and therefore had the status of one of these Feudatory Rajas. Both the Courts in India, however, found that the allegation was not proved.

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In appeal 91 the respondent was the zamindar of Madhupur and his estate was also situate in the Moghulbandi in Orissa. He claimed to hold not under a *kaulnama*, but under a sanad which he alleged had been lost.

Both the estates of Sukinda and Madhupur were held by the respondents under settlements from the British Government at a fixed *jama* in perpetuity, and were subject to the same legislation as any other permanently-settled estate in British India. They were both in the district of Cuttack, and by section 13 of Regulation XIII of 1805 it was provided that "all laws and regulations for the maintenance of the police and for the administration of justice in criminal cases in the Province of Bengal, which had been or shall be enacted, and which shall not be inconsistent with or repugnant to the provisions of this Regulation.....shall have full force and effect in the Zilla of Cuttack.

Bengal Act VI of 1870 (the Village Chaukidari Act) was passed to provide (*inter alia*), for the appointment, dismissal, and maintenance of village chaukidars, and applied at first only to Bengal; but was, by a notification of 25th May, 1899, extended by the Lieutenant-Governor of Bengal, under section 68 of the Act, to the district of Cuttack.

The duties of the village chaukidar, or watchman (who is one of the ancient institutions of the country), were to keep watch and to act in aid of the police, and they performed such duties under the directions and supervision of the District Superintendent of Police and the Magistrate of the district to whose authority they were subject. These chaukidars, of whom there were a large number throughout the estates of Sukinda and Madhupur, held, according to immemorial rule and custom, grants of land out of the estates as jagirs in remuneration for their services.

After the extension of Bengal Act VI of 1870 to Cuttack and the consequent appointment of chaukidars who were maintained and remunerated by the Government, the estates were no longer liable for the performance of the chaukidari duties, but became subject to assessment under the Act, and the imposition of a tax in chaukidari chakran lands: and the Collector under the orders of Government proceeded to ascertain the

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chaukidari chakran lands held as jagirs in Sukinda and Madhupur respectively, in order to deal with them under Bengal Act VI of 1870. Lists of the chaukidari chakran lands held as jagirs by chaukidars in these estates having been furnished to the Collector on 7th April, 1902 by the respondent in appeal 90, and on 8th August, 1901 by the manager under the Court of Wards of the estate of the respondent in appeal 91, the Collector made orders under the Act transferring the chaukidari chakran lands in Sukinda and Madhupur to the respective respondents in these appeals, and assessed the contributions payable to the Chaukidari Fund in respect of such jagir lands so transferred at Rs. 119-3-2½ and Rs. 410-11-6 respectively.

The respondents took possession of the said lands, and after making various objections, paid under protest the amounts assessed on the lands.

The suits out of which these appeals arose were instituted on 9th May, 1906 in respect of appeal 90, and on the 9th April, 1904 in respect of appeal 91. The cases of the plaintiffs as stated in their plaints were (*inter alia*) that the orders of the Collector were illegal inasmuch as the lands in suit were not chaukidari chakran within the meaning of Bengal Act VI of 1870; that they could not be the subject of a transfer or an assessment of revenue under section 48 of that Act; that the orders were in violation of the terms of the grants to them of their estates; and that no commission had been appointed in accordance with section 58 of the Act. The plaintiffs therefore sought a declaration that the lands so transferred by the Collector were not chaukidari chakran lands; that the Collector had no power to transfer or assess them; and that all proceedings taken by him for those purposes were illegal; and prayed for an injunction restraining him from interfering with the plaintiffs' lands.

The main defences set up were that the lands in suit were chaukidari chakran within the meaning of Bengal Act VI of 1870, that the orders of the Collector for transfer and assessment were valid, that no commission under section 58 of the Act was required, and that the suits were barred by limitation under article 14 of Schedule II of the Limitation Act, 1877.

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The judgment of their Lordships was delivered by

MR. AMEER ALI.—The plaintiffs in the two actions which have given rise to the present appeals are respectively the zamindars of Sukinda and Madhupur in the Province of Orissa, and the question for determination relates to certain lands included in their estates in respect of which the defendant, the Secretary of State for India in Council, claims to exercise the right of resumption and assessment by virtue of the provisions of Act VI of 1870 of the Bengal Council.

The facts of the two cases are set out with great clearness in the judgments of the High Court of Bengal, and do not, therefore, require a detailed statement. Their Lordships propose to give only a brief sketch of the circumstances which have culminated in the present litigation.

It appears that the predecessors of the two plaintiffs had been in possession of their estates from a time long anterior to the establishment of British power in that part of the country. The origin of their title under British rules is intimately connected with the political history of the province. Orissa consists of three well-defined tracts; in the middle lies a level open country inhabited by a settled population. Here the Moguls in the reign of Akbar introduced their revenue system with its regular assessment of public dues. These territories were consequently designated the *Mogulbandi*, which is defined in Regulation XII of 1805 as "being that part of the District of the Zillah of Cuttack in which, according to established usage, as in Bengal, the land itself is responsible for the payment of the public revenue, and in which every landholder holds his land subject to the conditions of that usage."

The wild and hilly tract on the west, and the low marshy lands along the sea-shore to the east were held by a number of chiefs who, under the designation of *rajas*, *zamindars*, and *khandaits*, were allowed to exercise a feudal sway in their respective *jagirs* on payment of a fixed tribute to the Imperial Government. These outlying parts of the Province were usually called the *Rajwara*.

The zamindaris of Sukinda and Madhupur lay within the *Rajwara* and outside the *Mogulbandi* territories.

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Shortly before the acquisition of the Dewanny by the East India Company, the Mahrattas had obtained possession of a large tract to the south of the Suvarnarekha river, including the *Rajwara*, and thus, when the Company obtained the virtual government of Bengal, Bihar and Orissa, under Shah Allam's grant, the *de facto* British possession of the latter province did not extend beyond the Suvarnarekha to the south of Midnapore.

In 1803, the Mahratta Raghoji Bhonslay, who held southern Orissa, came into collision with the forces of the East India Company, and in the October of that year the country south of the Suvarnarekha river was occupied by British forces. The settlement of the newly-acquired territories was entrusted to Colonel Harcourt, who commanded the Company's troops, and a civil officer of the name of Mr. Melville. They were designated Commissioners, and they appear to have done their work with great thoroughness. In this settlement were included the zamindars of Sukinda and Madhupur, to whom *sanads* were granted entitling them to hold their estates at a fixed *jama* in perpetuity. These two *zamindaris* were then brought within the *Mogulbandi* and subjected to the general regulations in force in Bengal.

Later in the year came the Treaty of Deogaun, by which Bhonslay ceded a considerable tract of country belonging to the hill chiefs. With these, agreements or *kaulnamas* were entered into guaranteeing the perpetual enjoyment by them of their properties on definite terms. The zamindar of Sukinda alleged in his suit that he also held under a *kaulnama*, but he failed to establish his allegation, which was evidently made under some misapprehension.

There is no doubt, however, that a settlement was made with, and a *sanad* granted to, him by the Commissioners, the terms of which will be referred to in the course of this judgment.

By Section 33 of Regulation XII of 1805 statutory confirmation was given to the *sanads* of the two plaintiffs' ancestors.

The lands in dispute admittedly form part of the estates settled with the plaintiffs' ancestors in 1803 and in respect of which the revenue was fixed in perpetuity. The plaintiffs accordingly urge that the Collector representing the defendant

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has no right to exercise in respect of these lands the powers he claims under Bengal Act VI of 1870. The basis of his contentions will appear clearly when the course of legislation which led up to this enactment has been shortly explained.

From time immemorial it has been customary in India to remunerate officers charged with certain public or quasi-public duties by grants of lands to be held either rent-free or at a reduced rent.

One of the best known examples of these service-tenures is the grant of lands in lieu of wages to individuals who were charged with the performance of police duties in rural areas, and is commonly known as *chowkidari chakran* lands, from the word *chowkidar* which means "a watchman" and *chakran* "service."

The history of these *chowkidari* grants is set out with considerable lucidity in Lord Kingdown's judgment in the case of *Joy Kishen Mookerjee* v. *The Collector of East Burdwan*.[1] The following passage explains the origin of the system and the shape it assumed after the Decennial Settlement of 1789 and the Permanent Settlement of 179

"It appears that these *zamindars* were entrusted, previously to the British possession of India, as well with the defence of the territory against foreign enemies as with the administration of law and the maintenance of peace and order within their district; that for this purpose they were accustomed to employ not only armed retainers to guard against hostile inroads, but also a large force of *Tannahdars*, or a general Police force, and other officers in great numbers, under the name of *Chowkidars*, *pykes* and other descriptions, as well for the maintenance of order in particular villages and districts as for the protection of the property of the *zamindar*, the collection of his revenue and other services personal to the *zamindar*.

"All these different officers were at that time the servants of the *zamindar*, appointed by him and removeable by him, and they were remunerated in many cases by the enjoyment of land rent-free or at a low rent in consideration of their services.

"The lands so enjoyed were called *chakrans* or service lands. These lands were of great extent in Bengal at the time of the Decennial Settlement, and the effect of that Settlement was to divide them into two classes:—

"First. *Tannahdary* lands, which, by Ben. Reg. 1 of 1793, sec. 8, cl. 4, were made resumable by the Government; the Government taking upon itself

[1] (1864) 10 Moo. I.A. 16.

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the maintenance of the general Police force and relieving the *zamindar* from that expense.

"Second. All other *chakeran* lands, which by Ben. Reg. VIII of 1793, sec. 41, were, whether held by public officers or private servants, in lieu of wages, to be annexed to the *malguzary* lands and declared responsible for the public revenue assessed on the *zamindars'* independent *talooks* or other estates, in which they were included in common with all other *malguzary* lands therein."

Later on, Lord Kingsdown explains the nature of the lands that were held by *chowkidars* in lieu of wages. Paraphrasing clause 4, section 8 of Regulation I of 1793, and section 41 of Regulation VIII of 1793, he says :—

"They were not to be included in the *malguzary* lands for the purpose of securing the assessment, because in the event of a sale upon default of payment of the assessment, it would be important that they should be transferred to the purchasers under the Government, with whom the appointment of the person whose duty would in part be to attend to public interests would vest."

It is clear from the language of clause 4, section 8 of Regulation I of 1793, and of section 41 of Regulation VIII of the same year, that the power or "option" of resumption was reserved in respect of those lands that had been appropriated by the zamindar with the permission or under the authority of Government for the purpose of remunerating the *chowkidars* for their services, lands which, although included in the mahal and "annexed" to the *malguzari* lands, were not taken into consideration for the assessment of revenue because in reality they formed no part of his assets.

Here it becomes necessary to notice the *sanad* that was granted to the zamindar of Sukinda in 1804, an attested copy of which is in the record. A *sanad* was also granted to the zamindar of Madhupur ; it apparently has been lost, but it may be assumed that it was to the same effect as the zamindar of Sukinda's *sanad*, the attested copy of which is, so far as is material, as follows :—

"As the duties of the zamindar of the said Killa have from before been entrusted to Dhrubjoy Bhupati Harichandan, the zamindar, the zamindari of the said Killa has been bestowed upon and given to the said zamindar by the Government of the East India Company ; you shall regard the said person as the permanent zamindar of the said Killa, and shall not act against his orders, instructions, and advice, shall not conceal and keep secret any matter whatsoever from him. The said zamindar shall

discharge the duties attached to the said zamindari in proper manner, and collect rent from the said zamindari in the best way according to the laws of the Government, and he shall without any objection pay into the Government Treasury 5,500 kahan cowris; the fixed annual amount payable to the Government, in proper time and according to proper instalments. He shall keep the tenants and the people in general satisfied and pleased by good treatment, and shall make such exertions and attempts as to make the zamindari improve and prosper, and he shall be so careful and vigilant that swords, guns, and other war weapons and ammunition may not be manufactured in the said zamindari, and the theft, robberies at night, and highway robberies may not be committed at any place; and in case such occurrence takes place, he shall arrest the thieves with stolen property and send them up to the Huzur (Government officers) for trial."

It will be observed that the *sanad* imposes on the zamindar the duty of preventing the commission of theft, robberies at night, and highway robberies, "and in case of any such occurrence," of arresting the offenders and "sending them for trial." But it makes no provision regarding the machinery he was to employ for the purposes. The evident inference is that the Government was content with leaving to the zamindar the manner in which he was to discharge the duty of maintaining peace and order in his *zamindari*. The Government obviously made no provision therefor. Regulation XIII of 1805, which was enacted "for the maintenance of the peace and for the support and administration of the police in the zillah of Cuttack," did not, as appears to be clear from the preamble and from the provisions of Section 5, relate to the *zamindaris* of Sukinda and Madhupur, the settlement of which, as already stated, had been made by special *sanads*.

The subsequent enactments, before the Act of 1870 passed with the object of regularising or improving the rural police, are not material to this judgment. It is sufficient to say that the system under which the village *chowkidars* as a part of the police machinery, held parcels of land as remuneration for their services, wherever in vogue, remained practically untouched until 1870. It was then that the necessity was felt of bringing the rural police or village *chowkidars* under the direct control of the State.

The preamble to the Act states the object with which it was enacted.

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Section 1 defines *chowkidari chakran lands*. It says :—

"The words 'chowkeedaree chakran lands' shall mean lands which may have been assigned, otherwise than under a temporary settlement, for the maintenance of the officer who may have been bound to keep watch in any village and report crime to the police, and in respect to which such officer may be at the time of the passing of this Act liable to render service to a zamindar."

The Act then lays down rules for the constitution of village *punchayets* or committees whose powers and duties are defined in considerable detail. In Part II, it proceeds to deal with the *chowkidari chakran lands*.

Sections 48, 49 and 50 form the most material provisions of the Statute for the purposes of the present discussion.

"48. All chowkeedaree chakran lands before the passing of this Act assigned for the benefit of any village in which a punchayet shall be appointed, shall be transferred in manner and subject as hereinafter mentioned to the zemindar of the estate or tenure within which may be situate such lands.

"49. All lands so transferred shall be subject to an assessment which shall be fixed at one-half of the annual value of such land according to the average rates of letting, land similar in quality in the neighbourhood of such land, and such assessment shall be made by the punchayet of the village.

"50. Such assessment when made by the punchayet shall be submitted to the Collector of the district, and he or any other officer exercising the powers of a Collector by him thereunto appointed may approve or revise and approve the same (provided that it shall be lawful for the zemindar to contest the assessment before it is so approved), and after such approval the Collector of the district shall, by an order under his hand in the form in Schedule (C), transfer to such zemindar such land subject to the assessment so approved."

Section 51 declares that the order of transfer made under section 50 shall operate to transfer the land to such zamindar subject to the assessment and subject to the rights of third parties.

Section 52 declares that the amount of the assessment shall be a permanent charge on the land; and the subsequent sections provide how it is to be realized in case of default of payment.

Section 58 empowers the Lieutenant-Governor to appoint commissions "to ascertain and determine"—

"the chowkeedaree chakran lands and other lands before the passing of this Act assigned for the maintenance of an officer to keep watch in any village and to report crime to the police in such district."

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But for the contentions, to which their Lordships will advert later, that have been advanced on behalf of the appellant, the Secretary of State for India, it would not have been necessary to give in extenso the above sections.

Bengal Act VI of 1870 was, when enacted, not introduced into Orissa; its operation was confined to Bengal where the category of lands referred to in Lord Kingsdown's judgment largely existed.

In 1899, the Act was, by a resolution of the Government of Bengal, dated the 9th of February, 1897 extended to Orissa.

It appears that the plaintiffs, the zamindars of Sukinda and Madhupur respectively, in discharge of the duties imposed on them by their *sanads* to maintain peace and order within their estates, retained in their service a large number of *chowkidars* whom, according to the custom of the country, in lieu of wages they remunerated by grants of land. A register of these *chowkidars* was kept in the zamindari office, and it would appear that in the appointment of the *chowkidars* in more than one instance the Government police-officer had a voice. But the records show that the zamindar often changed the lands held by these men, and resumed what he considered to be in excess of their requirements.

Such was the condition of affairs in these two *zamindaris* when the Act was made applicable to Orissa.

Shortly after its extension, the Collector of the Cuttack District proceeded to apply its provisions to the lands held by the *chowkidars* of Sukinda and Madhupur respectively, on the ground that they were *chowkidari chakran lands* within the meaning of the Act. The plaintiffs protested strongly against his proceedings: whilst expressing their willingness to submit to any reasonable contribution that might be required of them for the payment of the *chowkidars* who were to be appointed under the new system, they took exceptions to the Collector's attempts to resume and assess or re-assess their lands, and to transfer the same to them. Their objections were rejected, and the lands were then attached and put up to sale under the provisions of ss. 54 and 56 of the Act.

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The plaintiffs thereupon brought these actions in the Court of the Subordinate Judge of Cuttack, in substance, for a declaration that the Act did not apply to the lands in suit, and for an injunction restraining the defendant appellant from interfering with them.

The two suits were tried by two different Subordinate Judges, who affirming the contention of the Collector that the lands in dispute were *chowkidari chakran lands*, dismissed the actions. On appeal, the High Court of Bengal, after an exhaustive examination of the subject, reversed the decisions of the first Court and granted the plaintiffs the relief they sought.

The Secretary of State for India in Council has appealed in both actions; and it has been contended on his behalf that the learned Judges of the High Court were in error in referring to the previous legislation in order to construe Bengal Act VI of 1870; that the Act was applicable to all lands whether "assigned" by Government or by the zamindar for the maintenance of *chowkidars*; and that the onus was on the plaintiffs to show that they were not *chowkidari chakran lands*.

Their Lordships think that this argument proceeds on a manifest fallacy. The lands in dispute admittedly lie within the ambit of the estates settled with the plaintiffs' ancestors.

The respondents are the zamindars and "as such they have the *primâ facie* title," to use the language of this Board in the well-known case of *Rajah Sahib Perhlad Sein*,[1] to the full enjoyment of every parcel of land within their zamindaris for which they pay revenue to Government.

It rests on the defendant to show that when the zamindaris were confirmed to the plaintiffs' ancestors it was subject to reservations in respect of any land which gave Government the power of resuming and assessing it. That onus the defendant has not discharged; in fact it is not now contended for him that there was any such reservation. The power of resumption was as already remarked, reserved by Government by the old Regulations in respect of lands which had been set apart by the zamindars with its permission or under its authority.

[1] (1869) 12 Moo. I. A. 202, 331.

In Regulation I of 1793 the word used is "appropriated"; in Regulation XIII of 1805, the expression "assigned" is employed; but in both statutes the characteristics of the grants under which the lands were held depend on the implied authorisation of the Government which excluded them from consideration in the adjustment of the *jama* of the Mahal. In the present case the defendant has failed to show that any parcel of land was not taken into account in fixing the rent respectively payable by the plaintiffs, nor that there was any obligation on the part of the plaintiffs to make such grants. The only obligation on them was to maintain peace and order within their zamindaris. They entertained the services of *chowkidars* for whose maintenance they allotted from time to time certain lands of their own free will. The mere fact that some appointments were made with the approval of the Government officer cannot alter the nature of the grants.

In their Lordships' opinion the word "assigned" in the definition section of Bengal Act VI of 1870 means lands "assigned" by Government or appropriated under its authority or with its permission. Not only does the form of the "Transferring Order" in Schedule C of the Act clearly show that the expression "assigned" is applied to lands "assigned" by Government, as explained above, for maintenance of the *chowkidars* and in respect of which they reserved the right to resume and transfer to the zamindar subject to an additional assessment; but the resolution by which the Act was extended to Orissa leaves no possibility for doubt what the Government understood the Act to mean. Their Lordships do not propose to burden their judgment with long quotations from this interesting document; they only wish to refer to two passages which appear to them to place the matter beyond doubt. In one place the Lieutenant-Governor after reviewing the whole subject says:—

"As already remarked, the Chowkidari Jagirs are State grants. They are excluded in the temporarily settled estates from the settlements made with the zamindars, while in the permanently settled estates they cannot be legally interfered with by the zamindars. The latter have thus in both classes of estates no connection with the Jagir lands, and the Lieutenant-Governor accepts the view that they are under no obligation to furnish lands or otherwise specially provide for the maintenance of the chowkidars. Their liability is to contribute to any funds raised in the same manner as

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other residents of the villages. Nor is it binding on the Government to continue the Jagir grants for all time."

In the orders that are passed, a distinction is made with regard to the *chowkidari* holdings in the temporarily settled tracts, and those situated in "permanently-settled estates."

With regard to these it is declared that on resumption "the holdings should be included in the estates within which they lie, and form part of its assets in the future."

Nothing can be clearer in their Lordships' view that the Act was designed to deal with lands which, although lying within a Mahal, did not form a part of its assets, which is not the case with the zamindaris of Sukinda and Madhupur.

Their Lordships are of opinion that the judgments and decrees of the High Court should be affirmed and these appeals dismissed with costs. And they will humbly advise His Majesty accordingly.

Appeals dismissed.

NOTE.

Under Section 41 of Regulation VIII of 1793, the chowkidari chakran lands form part of the parent estate, in which they are situated. *Kazi Newaz Khoda* v. *Ram Jadu*, I. L. R., 34 Calc. 109; 5 C. L. J. 33; 11 C. W. N. 201. The resumed chowkidari lands, when transferred to the Zamindar, have not the character of an estate impressed upon them for all purposes. Thus Section 78 of the Land Registration Act is no bar to a suit for rent by the Zamindar's representative in interest, claimed for land which was upon resumption settled with the Zamindar. *Tincowri* v. *Satya Niranjan*, 19 C. L. J. 236; 18 C. W. N. 158. It becomes his *mal* or *zerait* land at his option (per Mookerjee, J.); (but zerait land, per Harington and Bodily, J.J.) *Jonab Ali* v. *Rakibuddin*, 1 C. L. J. 303; 9 C. W. N. 571. Right of occupancy can be acquired under Act X of 1859 even in *chowkidari chakran* lands (*Ram Kumar* v. *Ram Newaz*, I. L. R. 31 Calc. 1021; 8 C. W. N. 860), and is not destroyed on their resumption. Where such lands were resumed, and settled with tenants by a person who had no right to deal with the lands, these tenants cannot claim the rights of occupancy or non-occupancy raiyats against the real owner. *Jonab Ali* v. *Rakibuddin*, 1 C. L. J. 303; 9 C. W. N. 571.

The rights of landlords and *putnidars* respectively over resumed *chowkidari chakran* lands are governed by the terms of the patni leases or other agreements between them: *Rajendra* v. *Hira Lal*, 14 C. W. N. 995; *Gopendra* v. *Taraprasanna*, I. L. R., 37 Calc. 598; 14 C. W. N. 1049.

The fact that the Zamindar was entitled to make an appointment to the office of *chowkidar*, does not create in him an interest in the lands held by the *chowkidars*, which, upon resumption and transfer to the Zamindar, passes to the putnidar from whose lease they had not been excepted. *Girish* v. *Hem*, 5 C. L. J. 28. But where the Zamindar has power to dismiss the *chowkidars* and the putnidar is not in enjoyment of their services, he (the Zamindar) is entitled to the lands. *Nitya Nund* v. *Bejoy Chand*, 7 C. L. J. 593.

Present: LORD MOULTON, LORD SUMNER, LORD PARMOOR, SIR JOHN EDGE, and MR. AMEER ALI.

SRINATH ROY AND OTHERS

v.

DINABANDHU SEN AND OTHERS.

[*Reported in L. R. 41 I. A. 221; I.L.R. 42 Calc. 489 P. C.; 20 C.L.J. 385 P. C.; 18 C.W.N. 1217 P. C.*]

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Feb. 24; March 2, 3, 4; July 16.

The suit out of which the appeal arose was instituted by the appellants in 1903 for possession of a jalkar or fishery in certain tidal navigable waters, being part of the Ganges or Padma river in the district of Faridpur, for an injunction and mesne profits.

The appellants were the proprietors of a zamindari known as pargana Char Makundia and they claimed that a jalkar mahal described as in the river Balabanta was settled in their predecessor in title as a distinct mahal forming part of Char Makundia at the time of the permanent settlement, and had been enjoyed since. They alleged that the river Balabanta was at the date of the settlement a local name for the Ganges or Padma river. The channel in which they now claimed the right of fishing was navigable and had been formed in 1897 by a change in the course of the river, but they claimed that it was within the upstream and downstream limits of the jalkar granted to their predecessor and that their right of fishing extended to it, although (as was admitted in the appeal) that part of the channel which was in dispute flowed over the land of the first respondent.

The first respondent by his written statement of defence traversed generally the allegations in the plaint and denied that the appellants were entitled to any rights of fishery in the waters in suit, or in any waters outside the limits of their own zamindari. The nature of the evidence adduced by the appellants at the trial appears from their Lordships' judgment.

The judgment of their Lordships was delivered by

LORD SUMNER.—In this action the plaintiffs claimed, as proprietors of a several fishery in certain tidal navigable waters in Eastern Bengal, a decree, for possession of an exclusive fishery in a portion of a river channel, of which the principal defendants

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own both the bed and the banks. They succeeded before the Additional Subordinate Judge of Faridpur and failed on appeal to the High Court at Calcutta. Hence this appeal to their Lordships' Board.

There is a section of the river system of the Lower Ganges, between Dacca on the left bank and Faridpur on the right, where the great stream divides and for many miles runs in two channels roughly parallel with one another. The general course is to the south-east. The northern of the two channels is much the larger, but the southern, the smaller of the two, is itself wide. Both channels are tidal and navigable.

The streams in the Gangetic delta are capricious and powerful. In the course of ages the land itself has been deposited by the river, which always carries a prodigious quantity of mud in suspension. The river comes down in flood with resistless force, and throughout its various branches is constantly eroding its banks and building them up again. It crawls or races through a shifting network of streams. Sometimes its course changes by imperceptible degrees ; sometimes a broad channel will shift or a new one open in a single night. Slowly or fast it raises islands of a substantial height standing above high water level and many square miles in extent. Land so thrown up are called chars, and it is by char-lands formed at some unknown though probably not remote date that the northern and southern channels in question are at present divided.

In the year 1897 a channel was broken through the defendants' char-land in question. Though relatively small, even this stream was of considerable size ; it is navigable for small craft, and is certainly within the ebb and flow of the tide. This new branch probably followed a line of depressions already existing, one end of which was actually an arm running up from the northern river.

The plaintiffs claim the exclusive fishery in this new navigable channel as falling within the upstream and downstream limits of their several fishery, and allege that the defendants are trespassers when they fish in it. The defendants justify their claim to fish in a portion of this channel as part of the rights of owners of the subjacent soil and of persons claiming under them.

That the plaintiffs are entitled to some fishery right in the river waters generally, not far distant from the site in question, never was much disputed, and was admitted by the respondents before their Lordships' Board, but they dispute its origin and its extent. They say that this branch is of origin so recent that no title by prescription or adverse possession arises as against themselves ; that they are not affected by evidence of prescription against third parties ; that even a several fishery, duly created in the main stream by the Government of India in right of the Crown, would not extend to this new branch, still less would rights acquired in the main stream by prescription against other riparian proprietors be exercisable in it ; that the evidence neither establishes such bounds for the alleged exclusive fishery upstream and downstream as would bring this branch between them, nor shews that in fact any jalkar right was ever created by Government at all. In substance the trial judge found for an actual Government creation of the plaintiffs' right, as well as for the boundaries claimed by them. The High Court concluded against the plaintiffs on the question of the extent of their jalkar rights without determining their origin.

The evidence of the origin of the plaintiffs' rights is documentary, and does not depend on the credibility of witnesses. Char Makundia is the name of the plaintiffs' paragana. They produced among many other documents (*i*) an ekjai hastbud in respect of it for the year 1790, which shewed that it then included a mahal jalkar ; (*ii*) a hakikat chauhaddibandhi of the lands and jamas of that pargana for the year 1795, which shewed that the name of the jalkar mahal was River Balabanta and Bil Paor with specified boundaries, of which the Kole Chari of Alipur alone can now be traced by name ; (*iii*) daul kabuliyats of 1793 and 1799, specifying the amount of the daul-jamma of the jalkar ; and (*iv*) an ism-navisi mauzahwari of 1821 mentioning the jalkar in the River Balabanta as a mauza of pargana Char Makundia. They put in (*v*) a robokari of the Court of the Collector of Faridpur dated January 11, 1861, by which the Government recognized that this jalkar had been included as a mahal in the zamindari pargana Char Makundia (formerly taujih No. 110 in the Dacca Collectorate, and now No. 4000 in that of Faridpur), since before the decennial settlement. It named the

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upstream and downstream limits, and stated that the Balabanta river, in which it was enjoyed, was the same as that known in 1861 as the Padma, that is the larger and more northerly of the two branches of the Ganges above described. The more southerly has been known for some fifty years as the Bhubaneshwar.

Some evidence, not very distinct, was given at the trial, apparently for the purpose of shewing that no grant from the Government was any longer to be found among the papers belonging to the plaintiffs' zamindari, but no point seems to have been made then or since that the proper searches had not been made. Although, on the other hand, when Government has created a separare estate of jalkar at the period in question, it is usual to find some entry of it in the decennial settlement papers, no evidence was forthcoming to shew that jalkar grants made prior to the decennial settlement or that settlement with zamindars made at the time of it must necessarily have taken the form of pattas or some other muniments which should now be in the zamindar's possession, or be recorded in the Government archives still in existence. In practice such original grants are but rarely forthcoming now, and resort must be had to secondary evidence of them, or to the inference of a legal origin to be drawn from long user : Garth, C. J., in *Hori Das Mal* v. *Mahomed Jaki*.[1] The trial judge was satisfied that the plaintiffs had proved a Government grant or settlement about the end of the eighteenth century. He was overruled by the High Court, not on the ground that no such grant was proved, but that it was not shewn to have been a grant of a several fishery of wide extent. The High Court thought that in reality it was only appertenant to the plaintiffs' actual pargana and was limited by its riverain bounds.

Their Lordships accept the rule laid down in the case of *Hori Das Mal* v. *Mahomed Jaki*[1] (following the English rule in *Fitzwalter's Case*,[2] that the evidence of a Government grant of an exclusive fishery in navigable waters ought to be conclusive and clear, but they are of opinion that, in so far as such evidence can now be expected to be forthcoming as to particular grants more than a century old, the evidence in the present case was sufficient to shew that the competent authority—the Government

[1] I. L. R. 11 Calc. 434. [2] (1673) 3 Keb. 242.

of India in right of the Crown—did actually grant to the plaintiffs' predecessors in title, or settle with them so as in effect to grant, a jalkar right of several fishery in certain of the waters of the portion of the Ganges system in question.

The next point is one of metes and bounds. This depended partly on the above-named documents, partly on the records of certain litigation with the neighbouring zamindars of pargana Bikrampur and persons holding under them in 1816 and 1843, put in as part of the history of the fishery and of the claims made to it, partly on the testimony of living patnidars, ijaradars, fishermen, and so on, and the local investigations of an ameen deputed by order of the Court. The ameen's reports and maps were accepted in both Courts, and by both parties on the present appeal. The plaintiffs' case depended on fixing by means of the above materials, supplemented by a series of maps from 1760 onwards, four points roughly forming a parallelogram, within which their alleged jalkar rights lay, the western or upstream boundary and the eastern or downstream boundary in each case extending from points north of the northern or larger channel, the Padma, to points south of the southern or smaller channel, the Bhubaneshwar, and the *locus in quo* of the dispute falling between them. The defendants contended that in so far as any certain points were proved at all, the materials relied upon only shewed that the fishery did not extend into any part of the Padma, but was limitted by the right or southern bank of the main stream and thus excluded it. They pointed out that the Faridpur Collectorate was bounded by the right bank of the Padma, the whole breadth of the main stream being in the Collectorate of Dacca, and they argued that the robokari of 1861, which was the strength of the plaintiffs' case, proved at most a recognition of a fishery right, which stopped short of those waters in which it was now essentiial to the plaintiffs to make good their claim.

A sufficient answer is made by the plaintiffs. They obtain early evidence of the actual position of the points forming their boundaries north of the main stream from proceedings in suits decided in their favour between themselves or their predecessors in title and the owners of the Bikrampur zamindari, who claimed some jalkar rights in the main Padma also, and by means of

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such proceedings in 1797, 1816, and 1843, by means of other similar proceedings in litigation with some of the present defendants in 1894, 1896, and 1897, and also by a long succession of ijara kabuliyats and pattas, which they put in evidence, they prove *de facto* possession, as under their jalkar rights, of the whole fishery in both streams between their upper and their lower limits. It is an intricate task to trace the various spots mentioned from map to map, because of the periodic diluviation of trees and houses, though these are the least transient of the landmarks available. Matters are also complicated by variations in the names of the rivers, Bhubaneshwar, Krishnapur, Narina, Padma, and Balabanta or Balbanta. The result, however, is sufficiently clear. Further, the decision recorded in the robokari of 1861 was appealed to the Commissioner of the division at Dacca, who at that date exercised appellate jurisdiction in such matters over the Collectorate of Faridpur, and he affirmed the decision below. As this decision proceeded on the footing that the jalkar claimed extended over the waters of the Padma, and was a valid jalkar included in the permanent settlement, it may reasonably be inferred that the Commissioner of Dacca took note that the parties entitled to the jalkar claimed rights within his Collectorate, and, finding nothing in the Dacca records to the contrary, affirmed the decision below for Dacca as well as for Faridpur.

The trial judge, following a long and considerable body of decisions in Bengal, held that, if the plaintiffs' rights in this stream or streams out of which the new branch opened were once established, they would extend to the waters of the new branch as soon as it was formed, a principle which is conveniently called "the right to follow the river." It does not appear that this current of authority was challenged or doubted either before the trial judge or the High Court; certainly its authority was binding upon both. The defendants' case simply was that in fact neither the plaintiffs nor their predecessors in title could be shewn ever to have enjoyed or to have been entitled to any jalkar right except that lying within the boundaries of their zamindari and appertaining thereto. The High Court appears to have arrived at a conclusion in favour of the defendants' argument mainly in consequence of the view taken of the true

meaning of the judgment of 1816, and of the significance of the thakbast map of 1862, and a marginal note upon it. It is not necessary to examine the language of the judgment of 1816 in detail, but their Lordships are unable to hold that it excluded the main or northern stream from the plaintiffs' fishery, either expressly or by implication. The language is obscure, but, as their Lordships read it, the plaintiffs' construction of it was right. The thak map was pressed beyond its legitimate effect. It was concerned only with that portion of the fishery which fell within pargana Bikrampur and was inconclusive.

The question of the effect of deltaic changes in a river's course upon the exclusive rights of fishing in it appears in the Indian decisions as long ago as the beginning of the last century. It was laid down in 1807 that if a river changes its bed the owner of jalkar rights in the old channel continues to enjoy them in the new one: *Ishurchand Rai* v. *Ramchund Mokhurja*.[1] The converse case occurred in the following year. A land owner sued the owner of jalkar rights in a tidal river for taking possession of a jhil formed on his land by the overflow of the river. The channel of the river had not altered, the jhil formed no part of it, and was only connected with it at the river's highest stage. Accordingly, it was held that the owner of the fishery, having no right over the plaintiff's land, had no right to the fishery in waters thus formed upon their lands: *Gopeenath Ray* v. *Ramchunder Turklunkar*.[2] This assumed some right of following the river and placed a particular limit upon it. It will be observed so far that whatever may have been the basis for the right of jalkar in the river, the right of fishing in the jhils was treated as belonging to the owner of the subjacent soil, a right which was shortly after, in 1813, held to be severable from the ownership of the soil, so that the bare grant by the landowner of the right of fishing in the jhil did not in itself convey any property in the soil: *Lukhee Dasee* v. *Khatima Beebee*.[3] Why the owner of jalkar right in the river has, or may have, an enjoyment of that right co-extensive with the waters of the river which permanently form part of it, though they have changed their course, is not stated. Not improbably it rested on local

[1] (1807) 1 S. D. A. Rep. 221.
[2] 2 Sevestre, 467 n.
[3] (1813) 2 S. D. A. Rep. 51.

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custom, for the Bengal Alluvion and Diluvion Regulation (No. XI of 1825) is careful in a cognate matter to keep local custom alive. At any rate the principle was well established as early as 1808 that a right of fishery follows the river whatever course it may take, for the ground on which in *Gopeenath Ray* v. *Ramchunder Turklunkar*,[1] the High Court allowed the appeal from the Court below, which had acted on this principle, is simply that in point of fact the jhil in question, though formed by the river's overflow, was no longer so connected with it as to form part of the river. This was long considered to have been the effect of these decisions. Mr. Sevestre's note upon them in his reports (vol. 2, p. 467) is, "A general right of fishery in a river, when not otherwise defined, is restricted to the channel of the river and water considered to form part of it, not extending to adjacent lakes or other pieces of water occasionally supplied by overflowings of the river but not actually connected with the channel of it. The rule was so applied in 1856: *Nubkishen Roy* v. *Uchchootanund*[2]; and in 1863: *Ramanath Thakoor* v. *Eshanchunder Bonnerjee*.[3] In the former it was held that the right of jalkar in the river was confined to the river and streams flowing into or from it, exclusive of jhils not connected with the channel but extending to watercourses which though not immediately within the great channel of the river, adjoin or flow into it or are supplied therefrom; "their right consists of the flowing stream and the adjuncts flowing from or into it." In the latter the limitation of the river's adjuncts flowing from or into it was held not to extend to adjacent sheets of water with which the river communicates only when in flood. "We think," said the Court, "the grant of jalkar must be construed as *primâ facie* confined to the rivers and sheets of water communicating therewith to which the plaintiff might get access without trespassing on the land." It is true that these two decisions do not specifically deal with the case of the changed channel of a deltaic stream, but they do clearly lay down rules for defining the area of the waters in which the jalkar right is to be enjoyed, which carry it beyond the limits of actual navigability though confining it to waters which are adjuncts of the navigable stream. They make the right depend on the identity of

[1] 2 Sevestre, 467 n.
[2] 2 Sevestre, 465 n.
[3] 2 Sevestre, 463.

the river in which it is enjoyed and do not confine it to such waters of that river as are superimposed on the very land once owned by the grantor of the right. The current of decision was not unruffled by doubt. The Court observes in 1859 in *Gureeb Hossein Chowdhree* v. *Lamb*[1] : "the part of the country through which the Megna flows is intersected with innumerable creeks into which the tide from the main river flows. The right of fishing in these tidal creeks belongs of right to the owner of the property into which they flow," but this case is explained by the fact that the part of the river in question was almost if not quite an arm of the sea. An opinion was indicated in 1864, though not absolutely necessary to the decision, in *Moharanee Sibessury Dabee* v. *Lukhy Dabee*,[2] that the extension of rights of fishery, in consequence of an expansion of the river in which they were enjoyed, ought to depend, as questions of alluvion would, upon the rapidity of the expansion. If sudden, it would work no change in the ownership of the submerged soil, and so cause no extension of the jalkar right ; it would do both if it took place by gradual and imperceptible advances. The Court here inclined to connect the right of fishing indissolubly with the right to the soil subjacent to the waters in which the fishery right was enjoyed. In 1866 came two somewhat contradictory decisions. The Court in *Nobin Chunder Roy Chowdhry* v. *Radha Pearee Dabia*[3] scouted as "preposterous" a claim to follow the diverted waters in which the plaintiff had the fishery, but this was without discussion of the authorities, and the claim was alleged not against the owner of the soil over which the diverted waters flowed but against the owner of the fishery in the waters of another river into which the plaintiff's river had burst and discharged itself. In the second case, *Gobind Chunder Shaha* v. *Khaja Abdool Gunnie*,[4] the plaintiff and defendant, joint owners of land and of a fishery, had made a partition of the land but not of the fishery, and the plaintiff sought to oust the defendant from fishing over the land, which now belonged exclusively to him but had been overflowed by a change in the course of the waters. Sir Barnes Peacock in dismissing the suit observes, "still the fishery existed

[1] (1859) S. D.A. (Calc.) Rep. 1357, at p. 1363.

[2] 1 Suth. W. R. 88.

[3] (1866) 6 Suth. W. R. 17.

[4] (1866) 6 Suth. W. R. 41.

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in that part of the river out of which the fish was taken, although by a change in the course of the river it ran over the portion of the land which was allotted to the plaintiff under the butwara partition." Again in 1873, in *Krishnendro Roy Chowdhry* v. *Maharanee Surno Moyee* [1] the Court somewhat reluctantly followed the rule, which it deemed to be settled, that the owner of the fishery where the river's channel has changed has "a right to follow the current," that he "may not only follow the river to any channel which it may from time to time cut for itself, but may continue to enjoy together with the open channel all closing or closed channels abandoned by the river right up to the time when the channel became finally closed at both ends." Upon the facts of that case it is the latter part of this proposition that is directly involved in the decision. The whole question was learnedly reviewed by Mr. Lal Mohun Doss in 1891 in his Tagore Lectures on the Law of Riparian Rights, who (pp. 372 *et seq.*), while admitting a settled current of authority in India to the contrary, urges the very arguments and conclusions of the now respondents and relies on the same authorities. Nevertheless, after this discussion had brought the question again before the Courts and the profession, the High Court in a critical decision affirmed the long-standing rule. This was in 1890 in the case of *Tarini Churn Sinha* v. *Watson & Co.*[2] The questions were directly raised: "Can a right of jalkar in a public navigable river exist apart from the right to the bed of the river, or must it necessarily follow that right?" "Do the defendants lose their vested right by a change in the river's course, though the river still is navigable and subject to public right?" This case raised the very question which has been in debate before their Lordships, for the change in the river's course was a sudden one taking place in the course of a single year and not by imperceptible or slow encroachment. The answer given by the Court was in favour of the owner of the right of fishing in the river. It purported to follow a converse decision in *Grey* v. *Anund Mohun Moitra*,[3] and decided that "so long as the river retains its navigable character it is subject to the rights of the public, and the fishery remains

[1] 21 Suth. W. R. 27.

[2] I. L. R. 17 Calc. 963.

[3] (1864) Suth. W. R. (Extra vol.) 108.

in the person who was grantee from the Government." In *Grey's Case* [1] a change of channel had left an old bed either dry or containing only pools disconnected with the river, and it was held that what the river had abandoned, albeit part dry land and part jhils, became private property. Thenceforth it belonged to the riparian owners who could claim settlement of it from Government, and the reason given is that "the right of the defendant" (the owner of the fishery), "being granted out of and part of the Government's right to the river, no longer exists when the Government's right is itself gone." Thus it will be observed that in *Tarini Churn Sinha* v. *Watson & Co.*[2] the Court conceived itself to be reducing the subject to symmetry by deciding that while on the one hand the owner of the fishery rights in the river lost them where there was permanent recession of the river, he increased them where there was permanent advance of the river. In the latter case the Court disregarded the conception of Government right to the river as being an incident of Government right to the subjacent soil, and treated the Government right and the right of its grantee in respect of the fishery as subsisting in the river wherever that river might flow, and not as subsisting in flowing water only where and so long as it flowed over soil vested in the Government. This view has since been treated as established. That the jalker right in the river extends over a piece of water formed originally by the river, but so far dried up as to be disconnected from it, except in the rains, during and just after floods, was decided in 1905 in *Jogendra Narayan Roy* v. *Crawford*.[3] The ground of the decision is that such water is still part of the river system, and when that is so in fact the right of fishing persists in respect of it. This is the case of retrocession. So too in the case of *Bhaba Prasad* v. *Jagadindra Nath Roi* [4] in the same year the principle is thus expressed, "the jalkar rights were settled with the plaintiffs' predecessor many years ago. The plaintiffs by virtue of the settlement conferred upon them are entitled to exercise the right of fishery in the said river wherever it flows within the limits prescribed in the settlement itself." Both these cases purport to follow *Tarini Churn Sinha* v. *Watson & Co.*[2] which was a case of an advance of the river into a newly-formed

[1] (1866) Suth. W. R. (Extra. Vol.) 108.
[2] I. L. R. 17 Calc. 963.
[3] I. L. R. 32 Calc. 1141.
[4] I. L. R. 33 Calc. 15.

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channel, and the rest of a long line of settled authorities. It must now be taken as decided in Bengal that the Government's grantee can follow the shifting river for the enjoyment of his exclusive fishery so long as the waters form part of the river system within the upstream and downstream limits of his grant, whether the Government owns the soil subjacent to such waters as being the long-established bed, or whether the soil is still in a riparian proprietor as being the site of the river's recent encroachment.

Their Lordships were strongly and ably pressed to disregard, or at least to qualify, these decisions. The points made were (*a*) that in principle the right to grant a several fishery in tidal navigable waters is so essentially connected with the right to the soil and the bed of the channel, that no fishery right can exist where the grantor of the several fishery never has owned the subjacent soil; (*b*) that in any case the acquisition of fresh waters can go no further and can proceed not otherwise than the acquisition of fresh soil by alluvion, and therefore that an expansion of waters within which a jalkar right exists can only carry with it an extension of the jalkar right if it has taken place by imperceptible encroachments upon the land, and not by sudden irruption; and (*c*) that it would be grossly unjust to hold that the natural misfortune which swamps a landowner's soil by a river's encroachment should be accompanied by a legal ouster from such enjoyment as the natural disaster has left him. In extension of the last point it was argued that the disputed site in fact covered the sites of former enclosed jhils which belonged to and had been enjoyed by the defendants, and that no trespass could be committed as against the plaintiffs in any view by fishing where the defendants had formerly been accustomed and entitled to fish in waters overlying their own land. This question of fact, which seems not to have been passed upon by the Courts below, was not sufficiently made out, but even if it were, it appears to be covered by the general argument.

For these contentions reliance was placed on *Mayor of Carlisle* v. *Graham*,[1] where Kelly C. B. says: "We are called upon to decide the question which now arises for the first time: Is the several fishery of a subject in a tidal river, the

[1] L. R. 4 Ex. 361, at pp. 367, 368.

waters of which permanently recede from a portion of its course and flow into and through another course, where the soil and the land on both sides of the new channel thus formed belong to another subject, transferred from the old to the new channel, and so a several fishery created in and throughout such new channel, or in some, and if any, in what part of it? . . . . In the case of *Murphy* v. *Ryan*,[1] O'Hagan, J., in delivering the judgment of the Court, says, 'but whilst the right of fishing in fresh water rivers in which the soil belongs to the riparian owner is thus exclusive the right of fishing in the sea, its arms and estuaries, and in its tidal waters, wherever it ebbs and flows, is held by the common law to be *publici juris* and so to belong to all subjects of the Crown; the soil of the sea and its arms and estuaries and tidal waters being vested in the Sovereign as a trustee for the public. The exclusive right of fishing in the one case, and the public right of fishing in the other, depend upon the existence of a proprietorship in the soil of the private river by the private owner and by the Sovereign in a public river respectively.' And this is the true principle of the law touching a several fishery in a tidal river. If therefore the right of the Crown to grant a several fishery in a tidal river to a subject is derived from the ownership of the soil, which is in the Crown by the common law, a several fishery cannot be acquired even in a tidal river if the soil belong not to the Crown but to a subject. And all the authorities, ancient and modern, are uniform to the effect that if by the irruption of the waters of a tidal river a new channel is formed in the land of a subject, although the right of the Crown and of the public may come into existence, and be exercised in what has thus become a portion of a tidal river or of an arm of the sea, the right to the soil remains in the owner, so that if at any time thereafter the waters shall recede and the river again change its course, leaving the new channel dry, the soil becomes again the exclusive property of the owner, free from all right whatsoever in the Crown or in the public."

With this case has to be considered also *Foster* v. *Wright*.[2] There the proprietor of a right of fishing in the Lune, at that part neither tidal nor navigable, was held entitled to "follow his river" when the river had so far shifted its course as to flow over

[1] (1868) 2 Ir. Rep. C. L. 143, at p. 149. [2] 4 C. P. D. 438.

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another's land, and the person to whom the land which came to form its new bed had previously belonged was held to be a trespasser when he fished in its new channel. The change of bed had been gradual, perceptible, and measurable over considerable periods of time, but from week to week imperceptible. It was held that the imperceptible changes had had the effect of producing an accretion to the land of the owner of the fishery, and that "the river had never lost its identity nor its bed its legal owner" (p. 466), "he has day by day and week by week become the owner of that which has gradually and imperceptibly become its present bed, and the title so gradually and imperceptibly acquired cannot be defeated by proof that a portion of the bed now capable of identification was formerly land belonging to the defendant or his predecessors in title." *Mayor of Carlisle* v. *Graham*[1] was distinguished on the ground that in that case the river bed was a new bed, not formed by the gradual shifting of the old one but totally new, the old bed remaining recognizable in its old site but deserted. The Eden became a river with two beds: the Lune was at all times a river with only one, though an ambulatory one. As counsel in *Foster* v. *Wright*[2] boldly argued for the right to "follow the river" in its Indian sense, saying (p. 440); "even a sudden and violent change in its course would not have taken away" the plaintiff's right, and as the adoption of that a *fortiori* view would have made all consideration of gradual accretion immaterial, the decision must be regarded as one which negatives the contention of the respondents in the present case. As with the river Lune so the part of the river Eden which was in question in *Mayor of Carlisle* v. *Graham*[1] is one which does not appear to be subject to frequent change. How the law might be if conditions similar to those of Bengal could occur in England is another matter. The above cases would have been more directly in point had the river in question been one which often and swiftly changes its course, as for instance the tidal Severn, of which Hale writes (Hargrave's Law Tracts, p. 16), "that river, which is a wild unruly river, and many times shifts its channel, especially in that flat between Shinberge and Aure, is the common boundary between the manors on either side, *viz.*, the filum aquæ or middle

[1] L. R. 4 Ex. 362. [2] 4 C. P. D. 438.

of the stream. And this is the custom of the manors contiguous to that river from Gloucester down to Aure, ..." There is in this part of the Severn an ancient several fishery, enjoyed by the Lords of Berkeley under charters of Henry I, Richard I, and John, which must be much more analogous to the jalkar in the present case than cases in the rivers Eden or Lune. A somewhat similar instance in Scotland is mentioned by Lord Abinger in *In re Hull and Selby Ry. Co.*,[1] but the question of the right to follow the river does not appear to have arisen for decision in these cases.

It was admitted that the common law of England as such does not apply in the mofussil of Bengal, but the argument was that principles established under and for English conditions afford a sound guide to the rules which should be enforced in India. Their Lordships have given these arguments careful consideration, though they would in any case be slow to disturb decisions by which rules have been established for Bengal governing extensive and important rights such as rights of jalkar, and unless they could be shewn to be manifestly unjust or flagrantly inexpedient, their Lordships would not supersede them. The Indian Courts have in many respects followed the English law of waters. Sometimes their rules are the same ; sometimes only similar. Jalkar may exist not only as a right attaching to riparian ownership but also "as an incorporeal hereditament, a right to be exercised in the tenement of another" (*Forbes* v. *Meer Mahomed Hossein*[2] as a profit *a prendre in alieno solo* : *Lukhee Dasee* v. *Khatima Beebee*.[3] In navigable waters such rights are granted by the Government of India, or, what is equivalent to a grant, settled with the grantee under the Revenue Settlement by the Government, and are thus derived from the Crown : *Prosunno Coomar Sircar* v. *Ram Coomar Parooey*.[4] The freehold of the bed of navigable waters was deemed to be in the East India Company as representing the Crown and now is vested in the Government of India in right of the Crown : *Doe d. Seebkristo Banerjee* v. *East India Co*,[5] ; *Nogender Chunder Ghose* v. *Mahomed Esoff*.[6] Where the bed thus forms part of the public

[1] 5 M. & W. 327.
[2] 12 Beng. L. R. 210, at p. 216.
[3] 2 S. D. A. Rep. 51.
[4] (1878) I. L. R. 4 Calc. 53.
[5] (1856) 6 Moo. Ind. Ap. 267.
[6] (1873) 10 Beng. L. R. 406

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domain the public at large is *primâ facie* entitled to fish. Thus the English analogy has been closely followed. Again, the sudden invasion of a private owner's land by the waters of a navigable river does not divest the property in the soil. If the change in the course of the navigable river results in the water in the new course being in fact navigable—that is, capable of being traversed by a boat at all seasons : *Chundar Jaleah* v. *Ram Chunder Mookerjee*[1] ; *Mohinee Mohun Doss* v. *Khajah Assanoollah*[2]—the flooded landowner must submit to have his land traversed by the vessels of the public in the course of navigation and cannot in right of his ownership erect works on his flooded soil to the obstruction of the navigation. None the less he remains the owner, and should the waters permanently retire his full rights as owner revive unless lapse of time or circumstances, or both, suffice to prove an abandonment of his rights of ownership for his part.

Still, there is one step which the Indian law has never taken, far as it has gone in the adoption of English rules. Often as the opportunity for so doing has arisen, it has never been held that the capacity of the Government of India to grant to or settle with a private owner the exclusive right of fishing in tidal navigable waters is so indissolubly bound up with its ownership of the soil subjacent to those waters that, no matter how those waters may subsequently change their course, while still remaining part of the same river system within the upstream and downstream limits of the grant, the enjoyment of the right so granted cannot extend beyond the limits of the Government's ownership of the soil lying perpendicularly underneath them, as it may vest from time to time. It is one thing to presume the soil of the bed of a tidal navigable river to be vested in the Crown and to hold that the Government of India in right of the Crown can grant the fishery in the superincumbent waters in severalty, and quite another to hold that the several fishery when once thus created is for ever enjoyable only in waters that continue to flow precisely over ground which was in the Crown at the date of the grant. "Whether the actual proprietary right in the soil of British India," says Garth., C.J., in the case of *Hori*

[1] (1871) 15 Suth. W. R. 212. [2] (1872) 17 Suth. W. R. 73.

Das Mal[1] already cited, "is vested in the Crown or not (a point upon which there seems some diversity of opinion) I take it to be clear that the Crown has the power of making settlements and grants for the purposes of revenue of all unsettled and unappropriated lands, and I can see no good reason why they should not have the same power of making settlements of jalkar rights and of lands covered by water as of land not covered by water. In either case the settlement is made for the purpose of revenue and for the benefit of the public." Again, the rights of the Crown are thus stated in *Collector of Maldah* v. *Syed Sudrooddeen*[2]: "The right to resume land is one based on the right of the Government to a portion of the produce of every beegah of the soil as revenue, whereas the claim to possession of the jalkars of rivers not forming portions of settled estates is founded upon a supposed right in Government as trustees of the waterways of the country to possess and to assign the exclusive possession of them to any individual it chooses on the payment of revenue for them in the shape of a fishery rent." (*Hurreehur Mookerjea* v. *Chundeechurn Dutt*[3]; *Collector of Rungpore* v. *Ramjadub Sein.*[4] See, too, *Radha Mohun Mundul* v. *Neel Madhub Mundal*[5] and *Satcowri Ghosh Mondal* v. *Secretary of State for India*,[6] where the cases are collected and discussed.)

In truth the rule which in the United Kingdom thus connects the subject's right to an exclusive fishery in tidal navigable waters with the limits of the Crown's ownership of the subjacent soil is itself the result of conditions partly historical and partly geographical which have no counterpart in Lower Bengal. In Bracton's time this rule would seem to have been unknown; at any rate he ignores it, and treats the right of fishing in rivers, as did the Roman law, as a right *publici juris*. Whether in his time this was a common law orthodox or heterodox, or whether he supplemented the defects of our insular system by a reversion to that of Rome, need not now be considered. What is clear is that during the many years between his time and Hale's the generality of the right of river fishing, if it ever had been the doctrine of the common law, was such no longer. According to

[1] I. L. R. 11 Calc. 434, at p. 444.
[2] (1864) 1 Suth. W. R. 117.
[3] (1858) S. D. A. Rep. at 614.
[4] (1863) 2 Sevestre, 373.
[5] (1875) 24 Suth. W. R. 200.
[6] (1894) I. L. R. 22 Calc. 252.

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Hale (De Jure Maris, p. 1, ch. 4; Hargrave's Law Tracts, p. 11) "the right of fishing in the sea and the creeks and arms thereof is originally lodged in the Crown as the right of depasturing is originally lodged in the owner of the wastes whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river.....The King is the owner of this great waste, and as a consequent of his propriety hath the primary right of fishing in the sea or creeks or arms thereof." Be it observed that this doctrine may be called essentially insular, and that the proofs of it which Hale adduces are purely English, namely, Close Rolls, Parliament Rolls, and Rolls of the King's Bench mainly in Plantagenet times, and that he places on Bracton's Roman doctrine an interpretation, confining it to rivers which are arms of the sea, which is itself a dissent from that doctrine. The question how far a rule established in this country can be usefully applied in another, whose circumstances, historical, geographical, and social, are widely different, is well illustrated by the case of navigability, as understood in the law of the different States of the United States of America. Navigability affects both rights in the waters of a river, whether of passing or repassing or of fishing, and the rights of riparian owners, whether as entitled to make structures on their soil which affect the river's flow, or as suffering in respect of their soil quasi-servitudes of towing, anchoring, or landing in favour of the common people. The Courts of the different States, minded alike to follow the common law where they could, found themselves in the latter part of the eighteenth and the early part of the nineteenth centuries constrained by physical and geographical conditions to treat it differently. In Massachusetts, Connecticut, New Hampshire, and Vermont, where the rivers approximated in size and type to the rivers of this country, the English common law rule was followed, that tidality decided the point at which the ownership of the bed and the right to fish should be public on the one side and private on the other. Other States, though possibly for other reasons since they possessed rivers very different in character from those of England, namely, Virginia, Ohio, Illinois, and Indiana, followed the same rule. But in Pennsylvania, North Carolina, Iowa, Missouri, Tennessee, and Alabama, this rule was disregarded, and the test adopted was that of navigability in fact, the Courts

thus approximating to the practice of Western Europe (see Kent's Commentaries, iii. 525). The reasoning has been put pointedly in Pennsylvania. Tilghman, C. J., says in 1810, in *Carson* v. *Blazer*[1] "the common law principle concerning rivers" (namely, that rivers, where the tide does not ebb and flow belong to the owners of adjoining lands on either side), "even if extended to America, would not apply to such a river as the Susquehanna, which is a mile wide and runs several hundred miles through a rich country, and which is navigable and is actually navigated by large boats. If such a river had existed in England no such law would ever have been applied to it." See too, *Shrunk* v. *Schuylkill Navigation Co.*[2] Thirty years later, in *Zimmerman* v. *Union Canal Co.*[3] President Porter observes, "the rules of the common law of England in regard to the rivers and the rights of riparian owners do not extend to this commonwealth, for the plain reason that rules applicable to such streams as they have in England above the flow of the tide, scarcely one of which approximates to the size of the Swatara, would be inapplicable to such streams as the Susquehanna, the Allegheny, the Monongahela," and sundry other "rivers of Damascus." A similar deviation, equally grounded in good sense, from the strict pattern of the English law of waters lies at the bottom of the current of Indian cases previously referred to, and forms its justification.

In proposing to apply the juristic rules of a distant time or country to the conditions of a particular place at the present day regard must be had to the physical, social, and historical conditions to which that rule is to be adapted. In England the rights of the Crown and other rights derived from them have long been established by authority, even though their historical origin is imperfectly known or conjectural. The result may be that the law is quite certain and yet is based on considerations of history and precedent which are quite the reverse. In Bengal a special history and a special theory of rights, tenures, and obligations condition the rules applicable to such an incorporeal hereditament as that now in question. In England we go back before Magna Charta for the commencement of several fisheries

[1] (1810) 2 Binney (U.S.) 475, at p. 477.
[2] (1826) 2 Sergeant & Rawle, 71, at p. 78.
[3] (1841) 1 Watts & Sergeant, 346, at p. 351.

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in tidal navigable waters, and know little of their actual origin. In Bengal it is sufficient to say that at the time of the decennial or the permanent settlement, or since, such rights, though possibly descending from remote antiquity, were settled with the Government of India, whose special position, originating on August 12, 1765, when the East India Company became receiver-general in perpetuity of the revenues of Bengal, Orissa, and Behar, is historically well known. English tenures and Bengal zamindari rights, unduly assimilated at one time, have never fully corresponded to one another. Above all the difference, indeed the contrast, of physical conditions is capital. In England the bed of a stream is for the most part unchanging during generations, and alters, if it alters at all, gradually and by slow processes. In the deltaic area of Lower Bengal change is almost normal in the river systems, and changes occur rarely by slow degrees, and often with an almost cataclysmal suddenness. If English cases were applied to Bengal, so that the area of enjoyment of a several fishery in tidal navigable waters should be limited to the area within which the Crown, the assumed grantor of the fishery, had owned the subjacent soil at the time of its grant, who could say from time to time what the bounds of that enjoyment are, and where the ownership of soil is to be delimited? The course of the waters has been in flux for ages: at what date is this ownership to be taken? As Lord Abinger says of the rule of gradual accretion of soil in *In re Hull and Selby Railway*,[1] the theoretic basis of which has been variously stated from the time of Blackstone to the present day (see the different theories collected by Farwell, L. J., in *Mercer* v. *Denne*,[2] "the principle is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property." Take which date you will, the evershifting river does not run now where it ran then, and if the ownership of the soil remains as it was, it is sheer guesswork to say in which part of the present waters the grantee of jalkar rights shall enjoy his several fishery under his grantor's title, and in which parts he must abstain, since the waters flow over the soil of private owners. Any given section of the river system is in all probability a shifting and irregular patchwork of water flowing over soil which belonged to the

[1] 5 M. & W. 327.

[2] (1904) 2 Ch. 534, at p. 558.

Sovereign at the selected date and of water flowing over soil then belonging to other owners and since encroached upon, with the background of a probability that before the date in question, and yet within historic times, no water may have run there at all. By what analogy can rules applicable to the Eden and the Lune be profitably applied to such physical conditions ?

It was urged that the established rule with regard to alluvion should be applied to rights of jalkar ; that since the right to accretions and the liability to derelictions of soil attached only to gradual accretions or to erosions taking place by imperceptible degrees, so too the right of the owner of the fishery to "follow the river" ought to be limited to cases where the river's encroachments were gradual, and ought not to be extended to an irruption as sudden, and accomplished as rapidly, as was the formation of the channel in question in the defendants' lands. It is to be observed that here too Indian law, doubtless guided by local physical conditions, has adopted a rule varying somewhat from the rule established in this country. Where under English conditions the rule applies to "imperceptible" alterations, Regulation XI of 1825, arts. 1 and 4, speak of "gradual accession." The analogy of the English rule can hardly be prayed in aid when Indian legislation has thus an established and different rule on the same subject. Further, as the Indian rule is established now beyond question, it may perhaps be said without offence of the Indian as of the English rule, that it represents rather a compromise of convenience than an ideal of justice, for that which is a man's own does not become another's any more agreeably to ideal justice by being filched from him gradually instead of being swallowed whole. In any case the analogy is not in *pari materia*. Property in the soil is one thing ; enjoyment of a profit *a prendre* in flowing water may in some respects be another. True, the profit *a prendre* is to be enjoyed *in alieno solo* ; such is its nature. True too that, at the time of the grant, the grantor has no power to create this incorporeal hereditament where his ownership of the soil does not extend ; but when the power to grant arises from sovereignty, and has never been decided to be limited to the bounds of the grantor's proprietorship as it may continue to exist from time to time, the mere fact that the jalkar right is

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classified in the language of the English law of real property as a profit *a prendre in alieno solo* does not prevent its proprietor from being entitled to follow the river in its natural change. The fish follow the river and the fisherman follows the fish; this may be right or wrong, but the question is not settled by asking under what circumstances of natural physical change the proprietor of an acre of dry land, which has vanished from sight, can claim to have still vested in him an equal area of river bed on the same site, or another acre of dry land transferred by the river and attached by accretions to another proprietor's land.

Lastly, it is said to be unjust that a landowner should not only lose the use of his land when the river overflows it, but also the right to fish over his own acres and in his own waters, in order that another may unmeritoriously fish in his place. There is some begging of the question here; the waters are not his waters, nor is the change confined to the flooding of his fields. It is the river that has made his land its own; the waters are the tidal navigable waters of the great stream. In physical fact the landowner enjoys his land by the precarious grace of the river, whose identity is so persistent, and whose character is so predominating, as almost to amount to personality; and is it fundamentally unjust that in law too he should lose what he has lost in fact, and he precluded from taking in substitution for his lost land an uncorporeal right which has been granted not to him but to another? The sovereign power lawfully invests its grantee with jalkar rights in part of the river; is it unjust that when that river shifts its course, changing in locality but not in function, the owner of these rights should still enjoy them in that selfsame river, instead of being despoiled of them by the course of nature, which he could neither foresee nor control? There must be some rule and there must be some hardship. To say the least there is no such proof that one rule is better than the other as would even approach the conclusion that the rule established should now be set aside.

Their Lordships are of opinion that no reason sufficiently cogent has been found to warrant them in disregarding the settled Indian authorities, and being further of opinion that the plaintiffs established their claim at the trial, they will humbly

advise His Majesty that the appeal should be allowed with costs here and below, and that the judgment appealed from should be set aside and the judgment of the trial judge restored.

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NOTE.

A *jalkar* is a right of fishery and generally any right connected with water. This right of fishery is of three kinds—(1) a *free* fishery, (2) a *several* fishery, and (3) a *common of piscary*. A *free* fishery is an exclusive right of fishing in a public river, and is a royal franchise; a *several* fishery is the exclusive right of fishing; a *common of piscary* is the right of fishing in another man's water. A *free* fishery differs from a *several* fishery, because he that has a *several* fishery must also be (or at least derive his title from) the owner of the soil, which in a *free* fishery is not requisite. It differs also from a *common of piscary*, in that a *free* fishery is an exclusive right, and a *common of piscary* is not so; and therefore in a *free* fishery a man has property in the fish before they are caught; in a *common of piscary*, not till afterwards.

The English law of rivers is a branch of the territorial law of England, which is consequently not applicable to Mofussills in India. *Hori Das* v. *Mahomed*, I. L. R. 11 Calc. 434.

In England, the allegation of a *several* fishery *primâ facie* imports ownership of the soil: *Marshall* v. *The Ulleswater Steam Navigation Co.*, 3 B. & S. 732; but, even there, a *several* fishery may exist as an incorporeal hereditament apart from any ownership of the soil under the water. In this country, a *jalkar* does not necessarily imply any right in the soil (*David* v. *Grish*, I. L. R. 9 Calc. 183. See also *Radha Mohun* v. *Neel Madhub*, 24 W. R. 200), but may exist as an incorporeal hereditament, and as a right to be exercised on the land of another: *Lukhee Dasee* v. *Khatima* (1813) 2 Beng. S. D. A. Rep. 51; *Forbes* v. *Meer Mahomed*, 20 W. R. P. C. 44; 12 B. L. R. 210. A *putnee* of a *jalkar* is not an 'interest in land' within the meaning of the definition of 'tenure' in the District Road Cess Act, 1871 (Bengal Act X of 1871, since repealed and re-enacted by Bengal Act IX of 1880): *David* v. *Grish*, I. L. R. 9 Calc. 183. Where the lease of *jalkar* does not create any interest in land, the money reserved in the *kabuliat* is not 'rent' within the meaning of Section 67 of the Bengal Tenancy Act. *Krishna Lal* v. *Salim*, 19 C. W. N. 514 (516), dissenting from *Shib Prosad* v. *Vakai*, I. L. R. 33 Calc. 601. A jalkar right is not a mere easement, but is immovable property within the meaning of Art 145 of Limitation Act IX of 1871 (now Act IX of 1908): *Parbutty* v. *Madhoo*, I. C. L. R. 592. An occupancy right cannot be acquired in a *jalkar*: *Joggobundhoo* v. *Promothonath*, I. L. R. 4 Calc. 767. If the grant is merely a right of fishery, the lessee acquires no right in the sub-soil, should the water dry up: *Mahananda* v. *Mongola*, I. L. R. 31 Calc. 937; 8 C. W. N. 804. A suit for recovery of money payable under a jalkar lease conveying no right to soil but merely conferring a right of fishing is governed by Art. 2 cl. (b), Sch. III of the Bengal Tenancy Act, *Krishna Lal* v. *Salim*, 19 C. W. N. 514.

Whether the actual proprietary right in the soil of British India is vested in the Crown or not, the Crown has the power of making settlements or grants for purposes of revenue of all unsettled and unappropriated lands. The

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exclusive right of fishing in tidal navigable rivers may be granted by the Crown to private individuals: *Hori Das* v. *Mahomed*, I. L. R. 11 Calc. 434; *Ayub Ali* v. *Daya Bibi*, 12 C. W. N. 105. The right of fishing in tidal navigable rivers does not belong to the public. *Chundar Jaleah* v. *Ram Churn*, 15 W. R. 213. In the case of a grant, the right must ordinarily be proved by a direct grant from the Crown or by secondary evidence of the grant itself and in the absence of such proof of legal origin by inference to be drawn from long user. *Hori Das* v. *Mahomed*, I. L. R. 11 Calc. 434 (445); *Sarat* v. *Kalaram*, I. L. R. 33 Calc. 1349. But the evidence should be conclusive and clear.

Where a tidal and navigable river shifts its course, fishery rights continue to subsist in the river in its new course *Ayub Ali* v. *Daya Bibi*, 12 C. W. N. 105. The leading case shows that the rule is not limited to cases where the river's encroachment is gradual and imperceptible but where it is sudden. The grantee can follow the shifting river or the enjoyment of the exclusive right of fishery so long as the waters form part of the river system within the up-stream and down-stream limits of the grant, the right being made to depend on the identity of the river in which it is enjoyed and not being confined to such waters of the river only as are superimposed on the very land once owned by the grantor of the right. Even enclosed jheels belonging to riparian owners on becoming covered by the shifting river become subject to the grantee's jalkar right. When on account of a change in the course of a navigable river an arm of the river ceases to be an arm of the flowing river, the person who had a right of fishery in the river ceases to have any right to it; it becomes the property of the adjacent owner: *Ishan* v. *Upendra*, 12 C. W. N. 559. If by the irruption of the waters of a tidal or non-tidal river, a new channel is formed, although the rights of the Crown and of the public may come into existence and be exercised in what has thus become a portion of a river, the right to the soil continues in the owner, so that if at any time thereafter the waters recede, and the river again changes its course, leaving the new channel dry, the soil becomes again the exclusive property of the owner, free from all rights whatsoever in the Crown or in the public. *Thakurain Ritraj* v. *Thakurain Sarfaraz*, 2 C. L. J. 185 P. C.; I. L. R. 27 All. 655; L. R. 32 I.A. 165; 9 C. W. N. 889.

The decision in the leading case is confined to cases where the river made for itself a new channel where none existed. The solution of the question as to whether the owner of the fishery of a river is entitled to follow the river when it has changed its course lies mainly in the answer that can be given to the question whether or not the invading river has lost its identity. It is impossible to prescribe any hard and fast rules for the purpose of ascertaining the conditions in which the river may be said to have retained or lost its identity. *Sareda* v. *Khaja Mahammad*, 24 C. L. J. 158; 21 C. W. N. 1007.

The right of fishery cannot be exercised on the land of the adjoining owner, which was submerged gradually and imperceptibly by a non-tidal and non-navigable river: *Narendra* v. *Suresh*, 10 C. W. N. 540; 4 C. L. J. 51.

Section 4, Sub-section (5) of Regulation XI of 1825 has reference apparently to navigable rivers which are not tidal. Exclusive rights of fishing in such rivers can be granted to individuals by the Crown. *Hori Das* v. *Mahomed*, I. L. R. 11 Calc. 434 (443).

Present: LORD DUNEDIN, LORD MOULTON, SIR JOHN EDGE, and MR. AMEER ALI.

PAUL AND ANOTHER

v.

ROBSON AND OTHERS.

[*Reported in L.R. 41 I.A. 180; I.L.R. 42 Calc. 46; 20 C.L.J. 353 P.C.; 18 C.W.N. 933 P.C.*]

J. C. 1914. April 20; May 11.

The suit was brought by the appellants claiming an injunction or damages for an alleged interference with their right to access of light and air in respect of a freehold house and premises known as 7, Esplanade East, in Calcutta. The house, of which the plaintiffs were life-tenants, had been used as business premises in its two lower floors, and the top floor as a residential flat. It was admitted that the appellants had acquired by prescription rights to air and light in respect of the windows on the east side of the house, and it was alleged by them that those rights were interfered with by a new building which the respondents were erecting.

The judgment of their Lordships was delivered by

LORD MOULTON.—The action in which the present appeal is brought is an action in which the appellants sued the respondents for infringement of certain rights of light possessed by them in connection with premises known as 7, Esplanade East, Calcutta, of which they owned the freehold. The respondents had erected a building known as 8, Esplanade East, Calcutta, lying to the east of the appellants' premises, and so situated that the western walls of the respondents' buildings were parallel to and at a distance of seventeen feet from the eastern wall of the appellants' building. The ground on which the respondents' building was erected had for more than twenty years previously been occupied by much lower buildings, and it is conceded that the appellants had acquired rights of light thereby for the windows on the east side of their premises. The new buildings of the respondents greatly exceed in height the former buildings upon the site, and decreased the amount of light coming to the eastern windows of the appellants, and it is in respect of this interference with the access of light to their windows that the appellants brought the action.

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The action came on for trial with witnesses before Stephen, J., sitting as a judge of the High Court of Judicature at Fort William in Bengal, in its ordinary civil jurisdiction, and on March 29, 1911, he gave judgment dismissing the action. An appeal was brought from that judgment to the High Court of Judicature at Fort William in Bengal in its appellate jurisdiction, and on August 1, 1911, judgment was delivered by that Court dismissing the appeal. It is from this judgment that the present appeal is brought.

Both in the Court of first instance and in the Court of Appeal the facts of the case are dealt with in detail, and clear findings are given on all relevant points of fact. Their Lordships can find no material difference between the views taken by the two Courts on these points of fact, though the expressions used may not be in all cases identical. Their Lordships therefore would feel justified in holding, if it were necessary, that this is a case of concurrent findings of fact. But in truth the grounds of appeal do not relate to these findings of fact, but to the question whether the Courts below have taken the proper view of the legal rights of the appellants, and whether, accordingly, the test which they applied as to whether those rights had been infringed was the correct one. This is a pure question of law, and it was admitted by counsel for the appellants that it practically turns upon the interpretation to be given to the well-known decision of the House of Lords in the case of *Colls* v. *Home and Colonial Stores*,[1] when considered in connection with the later decision of the House of Lords in *Jolly* v. *Kine*.[2]

Their Lordships do not consider that it is either necessary or profitable to go into the history of the divergent views in respect of the nature and extent of rights of light acquired by prescription that prevailed in the Courts prior to the decision in *Colls' Case*.[1] It suffices to say that one stream of authorities gave countenance to the view that by the enjoyment of light for a period of twenty years there could be acquired an indefeasible right to the enjoyment of a like amount of light in the future. The conflicting stream of authorities countenanced the view that nothing constituted an infringement of rights of

[1] (1904) A. C. 179. [2] (1907) A. C. 1.

light which did not amount to an actionable nuisance, so that the amplitude of previous enjoyment was no measure of the rights acquired thereby. This conflict of views was fully recognized by the noble Lords who took part in the decision of *Colls' Case*,[1] and there can be no doubt that it was their intention to decide between them, and to lay down the law in such a manner as to prevent uncertainty in the future.

Stephen, J., takes as expressing the law laid down by this decision the following quotation from the opinion of Lord Davey in that case: "The owner . . . . of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind . . . . The single question in these cases is still what it was in the days of Lord Hardwicke and Lord Eldon—whether the obstruction complained of is a nuisance."

The Appellate Court, although they do not so directly base their judgment on the above passage in Lord Davey's opinion, appear to their Lordships to have substantially taken the same test. But in their Lordships' opinion it is not necessary to examine minutely the verbal differences between the expressions used in the Appellate Court and by the judge of first instance. They accept in full the findings in fact of the judge of first instance, and they are of opinion that he has consistently applied to them the legal test above formulated. The only question therefore is whether it accurately formulates the law on the subject.

It is evident on reading the opinion of Lord Davey that he intended the passage to be a precise formulation of the rights of a dominant tenement in respect of ancient lights, and his opinion was formally accepted by Lord Robertson, who also took part in the decision. The opinion of the Lord Chancellor in that case is equally clear on the essential points that the easement acquired by ancient lights is not measured by the amount of light enjoyed during the period of prescription, and that there is no infringement unless that which is done amounts to a nuisance. It has been suggested that a different view is to be found in the opinions

[1] (1904) A. C. 179.

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of Lord Macnaghten and Lord Lindley, but although there are passages in these opinions which might if they stood alone indicate that those noble Lords considered that to some extent the amount of light enjoyed in the past might influence the rights acquired for the future, there is no reason to think there was any intention on the part of those noble Lords to differ from the conclusions of their colleagues. It must be taken therefore that the House of Lords adopted the formulation of the law given by Lord Davey as above mentioned.

But if any doubt remained on the point it is in their Lordships' opinion set at rest by a consideration of the subsequent decision of the House of Lords in the case of *Jolly* v. *Kine*.[1] In that case Kekewich, J., had found as a fact that the obstruction complained of amounted to a nuisance, but in the course of his judgment said that the room affected was "still a well-lighted room." He gave judgment for the plaintiff. On appeal to the Court of Appeal there was a division of opinion among the judges. Romer, L. J., held that under the decision in *Colls' Case* [2] the finding that it was still a well-lighted room was fatal to the plaintiffs' claim. Vaughan Williams and Cozens-Hardy, L.JJ., held to the contrary. On appeal to the House of Lords their Lordships were equally divided, and accordingly the appeal was dismissed. But this division of opinion was not due to any doubt as to the law to be applied. The Lord Chancellor [3] gives his opinion on the law as laid down in *Colls' Case* [2] in the following words:—"The right of the owner or occupier of a dominant tenement to light is based upon the principle stated by Lord Hardwicke in 1752, in *Fishmongers' Co.* v. *East India Co.*,[4] that he is not to be molested by what would be equivalent to a nuisance. He does not obtain by his easement a right to all the light he has enjoyed. He obtains a right to so much of it as will suffice for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind having regard to the locality and surroundings. That is the basis on which the decision of this House proceeded."

Lord James of Hereford concurred in the judgment delivered by the Lord Chancellor.

[1] (1907) A. C. 1.
[2] (1904) A. C. 179.
[3] Lord Loreburn.
[4] (1752) 1 Dick. 163.

These were the judgments of the two noble Lords who were in favour of dismissing the appeal. On the other hand Lord Robertson was of opinion that the appeal should be allowed and in his opinion says: "I adhere, as I did in *Colls' Case*,[1] to the definition given by Lord Davey in entire accordance with the judgments of the other noble and learned Lords. According to the definition the quantity of light to which right is acquired in twenty years is 'what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind.'"

Lord Atkinson, who was the other member of the Court, was also in favour of allowing the appeal, and referring to the decision in *Colls' Case*,[1] he says:—"It would appear to me that that case established the principle that there must be an invasion of the legal right of the owner of the dominant tenement sufficient to amount to a nuisance in order to give him a right of action, and that as long as he receives through the windows of his dwelling-house, or, in the case of a particular room in his dwelling-house, through the windows of that room, an amount of light which, to use the words of James, L. J., in *Kelk* v. *Pearson*,[2] is 'sufficient according to the ordinary notions of mankind for the comfortable use and enjoyment' of his dwelling-house, or of the room in it, as the case may be, no nuisance has as regards him been created, and no legal wrong has been inflicted upon him."

And although he does not expressly repeat the well-known passage from Lord Davey's opinion in *Colls' Case*[1] he shews by the language which he uses that he thoroughly agrees with it and says that to him it appears to be of general application.

In the judgment of the House of Lords in *Jolly* v. *Kine*,[3] there is therefore an authoritative exposition of the decision in *Colls' Case*,[1] and it is established that the law as formulated by Lord Davey is the law laid down by that decision. It is somewhat remarkable therefore that counsel for the appellants should have sought to treat the decision in *Jolly* v. *Kine*[3] as throwing some doubt upon the interpretation of the decision in

[1] (1904) A. C. 179. [2] (1871) L. R. 6 Ch. 809.
[3] (1907) A. C. 1.

J. C. 1914. Paul v. Robson.

Colls' Case,[1] operating, if such an expression could be used, to weaken it in the direction of directing that regard should be had to the extent of previous enjoyment of light. The only explanation of such a view is that the appeal was in the end dismissed, inasmuch as the House was equally divided. But this was in no way due to any difference of opinion as to the law, but to the fact that the Lord Chancellor felt himself entitled to disregard the finding that the room was "still a well-lighted room" in the sense which those words would naturally convey and to hold them as meaning that it would have been considered to be well-lighted "according to the standard of a crowded city." His Lordship was led to this conclusion by passages in the evidence and the context of Kekewich, J.'s judgment. It was on this ground alone that he was in favour of dismissing the appeal, and therefore the actual result in that case has no bearing on its effect as an authoritative explanation of the law laid down in *Colls' Case*.[1]

Their Lordships are therefore of opinion that the learned Judge at the trial took the proper test as to whether or not there had been an infringement of the rights of the appellants and that he applied it correctly to the facts of the case. They are therefore of opinion that his judgment was right and that the Court of Appeal was right in affirming it, and they will humbly advise His Majesty that the present appeal should be dismissed with costs.

NOTE.

Section 26 of the Indian Limitation Act is concerned only with the acquisition of the easement, and does not purport to measure the extent of the right, or to indicate the remedy by which a disturbance of the right is to be vindicated. The extent of the right, in the absence of express stipulation, hardly admits of precise measurement; but the point at which its invasion becomes actionable in concrete cases is capable of description, and that description is one which is indicated by the remedy by which the right can be vindicated. That remedy is a suit not for trespass, but for nuisance, and "Nuisance," it is said, "is where any man raises any wall or stops any water or doth anything on his own ground to the unlawful hurt or annoyance of his neighbour. It may also be by stopping lights in a house or causing water to run over house or lands for remedy whereof an action upon the

[1] (1904) A. C. 179.

case or assize lyeth." What amounts to a nuisance must largely be a question of fact to be determined by reference to the circumstances of each case, the test being that there has been a sensible abridgment of the plaintiff's right resulting in loss to him. Where the alleged nuisance is an interference with an easement of light or air to a house, that is unoccupied but suitable for residence and business purposes, it must be shown that there has been a suitable privation of light sufficient to render the occupation of the house uncomfortable and to a sensible degree less fit for the purposes of business. *Paul* v. *Robson*, I. L. R. 39 Calc. 59 (76, 77).

The case of *Jibanandi* v. *Kalidas*, I. L. R. 42 Calc. 164 shows how the extent of right of prescription is measured.

Before MOOKERJEE and BEACHCROFT, JJ.

JIBANANDA CHAKRABARTY
v.
KALIDAS MALIK.

[*Reported in I. L. R., 42 Calc., 164; 20 C. L. J. 97; 18 C. W. N. 1296.*]

1914.
May, 26.

MOOKERJEE AND BEACHCROFT, JJ.—This is an appeal by the defendants in a suit for declaration of the prescriptive right of the plaintiffs to take water from a tank, for removal of the obstruction erected by the defendants to the exercise of such right, and for an injunction to restrain interference in future. The facts are not in controversy at this stage and may be briefly narrated. The defendants are the owners of a tank which stands on their land. The plaintiffs are neighbours and have their residence at some distance towards the east of the tank. They and the members of their family have, for more than 20 years, peaceably and openly, as of right and without interruption, used the water of the tank, and claiming title thereto as an easement. They used to obtain access to the water by a path across the east bank and down a flight of steps on the eastern slope of the bank. In 1908, the defendants re-excavated the tank, repaired the slopes on all sides and built a flight of masonry steps on the northern slope. Since then, the defendants have prevented the plaintiffs from access to the water in the accustomed manner by what has been described as the eastern ghat. The defendants, however, do not deny that the plaintiffs have acquired a right of easement in the water of the tank, and they are agreeable to the use of the water by them by means of the new flight of steps built on the northern slope. But the plaintiffs are not satisfied with this and insist on their right to reach the water by what formed the eastern ghat and has now been obliterated by the defendants. The question consequently arises, whether when the owner of a dominant tenement has acquired a prescriptive right to take water from a tank on the servient tenement, and has for this purpose used a particular means of access for the statutory period, he has acquired a right to reach the water by means of such definite mode of access, or, may the servient owner, at his own discretion,

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substitute for his use some other means of access. No authority directly in point has been placed before us by either the appellants or the respondents in support of their respective contentions. But we are of opinion that on principle the question must be answered in favour of the dominant owner.

It is plain, as was pointed out by Lord Campbell, C.J., in *Race* v. *Ward*,[1] that water as it issues on excavation of a well or a tank, is not to be considered as produce of the soil, and that a right to enter on land and to take such water may be acquired as an easement: *Manning* v. *Wasdale*,[2] *Constable* v. *Nicholson*,[3] *Macnaghten* v. *Baird*,[4] *Gardner* v. *Hodgson*.[5] This right it is obvious, may be analysed into two constituent elements, namely, a right to go on the land of the servient owner and a right to take the water which stands on his land, and so long as it stands there, is his property. The two constituent rights are acquired simultaneously, but each must nevertheless be acquired in conformity with the statute. Now, in so far as a right of way is concerned, it is clear that to establish a private right of way by prescription it is necessary that in going across the land to any particular point or for any particular purpose a particular route must be used. As Morton, J., puts it on behalf of the Full Bench in *Hyot* v. *Kennedy*,[6] "to establish a way by prescription, the use must be not only open, adverse, uninterrupted, peaceable, continuous, and under a claim of right, but must be confined substantially to the same route and to substantially the same purpose for which the way was designed originally, unless the way is one for all purposes." This is plain, for a way imports of necessity a right of passing along a particular route between certain termini: *Jones* v. *Percival*,[7] *Holmes* v. *Seely*,[8] *Rogers* v. *Duncan*.[9] On this principle it has been ruled that the owner of a private right of way is entitled to enter the way at one and the same place only, and not at any other; for instance, if a way to a field runs by the side of the field, the dominant owner is not entitled to alter the position of the gate through which he has been accustomed to pass from the field to the way and to make a new

[1] (1855) 4 E. & B. 702; 99 R. R. 702.
[2] (1836) 5 A. & E. 764; 44 R. R. 576.
[3] (1863) 14 C. B. N. S. 230.
[4] (1903) 2 I. R. 731.
[5] (1901) 2 Ch. 148.
[6] (1898) 170 Mass. 54.
[7] (1827) 5 Pick. 485.
[8] (1828) 19 Wendell. 507.
[9] (1890) 18 Can. Sup. Ct. 710.

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entrance at a fresh place; *Woodyer* v. *Haddon*,[1] *Beridge* v. *Ward*,[2] *Marshall* v. *Ulleswater S. N. Co.*[3] The rule is based on obvious good sense, for though the servient owner may not object to a person entering his land at a particular spot, for that may not cause him any inconvenience, it may be very much against his inclination, and it may be detrimental to his property that the dominant owner should enter it at any other place. But the position is clearly mutual, and if the right of way has been acquired from one point to another in a particular direction, the servient owner cannot, at his choice, substitute another way between the same points but by a different route, which might be less convenient to the dominant owner. It is for the protection as well of the dominant as of the servient owner that the right acquired should be limited to the part of the area of the servient tenement over which it has been actually exercised; *Clifford* v. *Hoare*,[4] *Wood* v. *Stourbridge Ry. Co.*,[5] *Strick & Co.* v. *City Officers Co.*[6] To put the matter briefly, the extent of a right acquired by prescription is measured by the extent of the use and enjoyment thereof during prescriptive period: or, as Lord Watson stated it in *MacIntyre Brothers* v. *MacGavin*,[7] a prescriptive right to take water in a particular way and at a particular place infers no right to take the supply of water in any other way and at any other place: *Blackburne* v. *Sommers*,[8] *Hussain Rowther* v. *Abubakar*.[9] We are not here concerned with the question of the alteration of the mode of enjoyment of a right of easement by mutual consent of parties, nor are we called upon to examine the question of the right of the dominant owner to deviate from the way acquired by prescription, when such way has been obstructed by the servient owner himself: *Selby* v. *Nettlefield*,[10] *Hawkins* v. *Carbines*.[11] The general rule is that when a right of way by a particular track has been acquired by a dominant owner, the servient owner, cannot force upon him, in lieu thereof, a different track, any more than the dominant owner himself can, at his

[1] (1813) 5 Taunt. 126, 132.
[2] (1860) 2 Fos. & Fin. 268, affirmed in (1861) 10 C. B. N. S. 400.
[3] (1871) L. R. 7 Q. B. 166.
[4] (1874) L. R. 9 C. P. 362.
[5] (1864) 16 C. B. N. S. 222.
[6] (1906) 22 T. L. R. 667.
[7] (1893) A. C. 268, 277.
[8] (1879) L. R. 5 Ir. 1.
[9] (1909) 20 Mad. L. J. 699.
[10] (1873) L. R. 9 Ch. App. 111, 114.
[11] (1857) 27 L. J. Ex. 44.

discretion, take recourse to a different path. Tested in the light of this principle, the claim of the plaintiffs is unanswerable. They have proved to the satisfaction of the Courts below, that, for much longer than the statutory period, they have had free access to the water of the tank of the defendants by a track across the eastern bank and by a flight of steps down the eastern slope. The prescriptive right they have acquired has become indefeasible and the defendants were not entitled to improve the tank so as to interrupt and make impossible the exercise of the right of the defendants in the particular mode they had adopted for many years. The position might have been different if the plaintiffs had merely proved that they had appropriated the water of the tank for the statutory period and had failed to show that they had used a definite means of access to reach the water; in such a contingency, while the plaintiffs would have acquired a prescriptive right to use the water, they could not have claimed access to the tank by a particular path; they would have had no ground for complaint so long as the defendants allowed them reasonable facilities of approach to the tank. In the case before us, however, the plaintiffs, as we have seen, stand in a position of much greater advantage; they have acquired a right to reach the water by a definite path and also a right to use the water. We may add that the conduct of the plaintiffs is really not quite so unreasonable as has been characterised by the defendants. The access to the water of the tank by way of the flight of new masonry steps on the northern slope involves the use of a longer and more circuitous way and what is more important, a loss of privacy, to which so much importance is attached by females in this country. But it is immaterial what motive animates the plaintiffs, for, as Lord Halsbury, L. C., said in *Mayor of Bradford* v. *Pickles*,[1] no use of property which would be legal if due to a proper motive, can become illegal, because it is prompted by a motive which is improper or even malicious. We are of opinion that as the plaintiffs have acquired a right, not merely to the use of the water of the tank of the defendants but also to have access to the water in a particular mode, the Court of first instance rightly decreed

[1] (1895) A. C. 587.

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the suit; and as that decree has been confirmed by the Subordinate Judge, this appeal must be dismissed with costs.

Appeal dismissed.

NOTE.

An easement is something belonging, attached, adhering, appurtenant, to the dominant estate itself and not to the owner thereof personally: *Narasappayya* v. *Ganapathi*, I. L. R. 38 Mad. 280 (282). It exists for the benefit of the dominant tenement alone and the servient owner acquires no right to insist on its continuance or to ask for damages on its abandonment; *Bimolanand* v. *Chandra Kant*, 19 C. L. J. 45.

Section 26 of the Indian Limitation Act is concerned only with the acquisition of the easement, and does not purport to measure the extent of the right, or to indicate the remedy by which a disturbance of the right is to be vindicated. *Paul* v. *Robson*, I. L. R. 39 Calc. 59 (76). The leading case shows how the extent of right of prescription is measured. The remedy by which a disturbance of the right is to be vindicated is stated in *Paul* v. *Robson*, I. L. R. 42 Calc. 46 P. C.

Before JENKINS, C. J., STEPHEN, WOODROFFE, HOLMWOOD and D. CHATTERJEE, JJ.

MIDNAPORE ZEMINDARY COMPANY, LD.

v.

HRISHIKESH GHOSH.

[*Reported in I. L. R. 41 Calc. 1108 ; 19 C. L. J. 505 ; 18 C. W. N. 828 F.B.*]

1914.
April, 21.

The judgment of the Court was as follows :—

The question referred for the decision of the Full Bench is whether the right of a non-occupancy raiyat is heritable. In *Karim Chowkidar* v. *Sundar Bewa* [1] it was held by a Division Bench that the right of a non-occupancy raiyat (who does not hold under any express agreement) in his holding is not heritable. In arriving at this conclusion, Mr. Justice Banerjee says that "under the law as it stood before the Bengal Tenancy Act was passed, non-occupancy raiyats not holding under any express engagements, were treated as tenants-at-will or as tenants from year to year. [See Act X of 1859, section 25 ; see also the observations of Mr. Justice Field in his Introduction to the Bengal Regulations, p. 40, and those of Mr. Justice Trevor in *Thakooranee Dossee* v. *Bisheshur Mookerjee*.[2]] Under the old law, non-occupancy raiyats were the lowest class of raiyats and, if the respondents' contention be correct, it would follow that all raiyati holdings were transferable. But this would be somewhat inconsistent with certain provisions of law, such as Regulation VIII of 1819, section 11, clause 3, which speak of hereditary raiyats."

Any opinion of Mr. Justice Banerjee is entitled to respect, but the passage we have cited is open to question.

It is not accurate to speak of non-occupancy raiyats under the old law. The expression non-occupancy raiyat first appears in the Bengal Tenancy Act and the holding of non-occupancy raiyats is not the exact counterpart of any holding under the old law, by which we understand the learned Judge to mean the law prior to 1859. For the present purpose it is sufficiently

[1] (1896) I. L. R. 24 Calc. 207.

[2] (1865) B. L. R. F. B. 202; 3 W. R. (Act X) 20.

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accurate to say that raiyats in early days were either *khudkast* or *paikast*. It is unnecessary to discuss the several kinds of these two classes of raiyats, but contrasting one class with the other, it may be said that the position of the *khudkast* was unquestionably superior to that of the *paikast*.

The *khudkast* was, speaking generally, a man of the village in which his holding was situate, and it is, we think, conclusively established that his holding ultimately was hereditary.

The *paikast* was not a man of the village where the land cultivated by him was situate; he was an immigrant.

There is reason to think that originally he was a tenant-at-will, but until the demand for land exceeded the demand for cultivation, this probably was of no great moment.

But as this economic position was reversed, the inconveniences of tenancies-at-will became apparent, and so we find they gradually gave way to tenancies of a more fixed character, either from year to year or for a greater interest (Whinfield on Landlord and Tenant).

While the tenancy was at will, it obviously could not be heritable, for it would of necessity be terminated by the raiyat's death. But with the greater fixity of later times this would no longer be so, and on the raiyat's death there would be an interest that could devolve on his heir even though the tenancy was from year to year. So matters stood when Act X of 1859 was passed. That Act and the Bengal Act of 1869 and the Bengal Tenancy Act of 1885 have deprived the division of raiyats into *khudkast* and *paikast* of its importance, and under the Bengal Tenancy Act we find raiyats grouped as (*a*) Raiyats holding at fixed rates, (*b*) occupancy raiyats, and (*c*) non-occupancy raiyats (Section 4). In section 20 mention is also made of "Settled Raiyats" a class largely composed of, but not identical with, occupancy raiyats, for though every settled raiyat has occupancy rights, some raiyats who have occupancy rights are not settled raiyats.

These several classes of raiyats, where the Bengal Tenancy Act governs, have taken the place of *khudkast* and *paikast* raiyats, with which the practical lawyer has no concern except in order to trace the growth of raiyati rights. The result then

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is that (apart from possible exceptions with which we have no concern in this case) when these Acts were passed, a tenancy-at-will had ceased to be the measure of any raiyati rights and so all had interests that are capable of descent.

More than that, we think (apart from the possible exception to which we have referred) the holdings of raiyats were heritable, and this is distinctly recognised by the Bengal Tenancy Act. Thus the meaning ascribed to raiyat by section 5, clause (2) includes successors in interest. Section 20, clause (3) identifies the heir of a raiyat with his predecessor for the purpose of acquiring the status of a settled raiyat. Section 44 bestows on a non-occupancy raiyat a fixity of tenure that points to heritability. Chapter IX contemplates improvements which it would be unreasonable to expect in a tenancy not heritable, and entitles a raiyat to compensation for improvements, made by his predecessors in interest (section 82). And certain rights of non-occupancy raiyats are "protected interests" under section 60.

Much has been made of section 26, on which it is sought to build up the argument referable to the maxim *expressio unius exclusio alteris*, but this maxim is at best an uncertain guide to the true meaning of a Statute. Here it seems to us to have no application. Section 26 deals with the devolution of a right of occupancy, not of a holding pure and simple, and as this right of occupancy is a creature of the Statute and a doubt had been expressed as to the heritability of a right of occupancy under Act X of 1859, there was good reason for making this provision in relation to a right of occupancy, which would not apply to the ordinary holding of a raiyat, which is not a creature of the Act though some protective provisions are applied to it which make for fixity of tenure.

It is true in *Lakhan Narain Das* v. *Jainath Panday*[1] the question now under consideration was referred to a Full Bench of this Court. But no conclusive answer was given, for while two of the learned Judges refrained from expressing any opinion as to whether or not a non-occupancy right was heritable before the passing of the Bengal Tenancy Act, only

[1] (1907) I. L. R., 34 Calc., 516.

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Mr. Justice Geidt held that it was not; and the remaining two, Mr. Justice Brett and Mr. Justice Mitra held that it was. It is the inconclusive result of that case that has necessitated the present reference.

It is unnecessary to recapitulate the reasons severally advanced by Mr. Justice Brett and Mr. Justice Mitra in support of their view that non-occupancy holding is heritable, for we are in complete accord with the opinion expressed by them.

The answer then that we give to the question referred to us is that, apart from possible exceptions with which we have no present concern, the holding of a non-occupancy raiyat is heritable.

As the question has arisen in an appeal from appellate decree, under the rules of the Court, we must dispose of the whole appeal.

The question of heritability affects only a moiety of the land in suit and the opinion we have expressed is decisive against the plaintiffs' claim to that moiety. The claim to the other moiety manifestly cannot be supported.

The result is that the decree of the lower Appellate Court must be confirmed with costs.

Appeal dismissed.

NOTE.

A non-occupancy raiyati holding is heritable and in the absence of custom or local usage not transferable nor bequeathable (S. 183). The raiyat (non-occupancy) can sub-let his holding (S. 85); but the sub-lease can be annulled by a purchaser of the holding (non-occupancy) at a sale for its own arrears under S. 159 of the Bengal Tenancy Act. *Ram Lal* v. *Bhela*, 14 C. W. N. 814; I. L. R. 37 Calc. 709. He cannot be ejected for parting with the possession of a portion of his holding.

Expressio unius est exclusio alterius:—The mention of one is the exclusion of another. By particularising one or more members of a class, or object of a group, an intention may be indicated to exclude the rest. An instance of the application of this rule is, where a particular custom is sought to be introduced into a written contract, at the instance of the parties. This cannot be done when the contract contains express stipulation of a nature contrary to the custom.

Before MOOKERJEE AND BEACHCROFT, JJ.

AMULYA RATAN SIRCAR

v.

TARINI NATH DEY.

[*Reported in I. L. R. 42 Calc., 254; 21 C. L. J. 187; 18 C. W. N. 1290.*]

1914
Jan. 30

MOOKERJEE AND BEACHCROFT, JJ.—The subject matter of the litigation which has culminated in this appeal, is one half share of an occupancy holding, which admittedly belonged at one time to Tarapada Chatterjee. The right to this one half share is claimed, on the one hand, by the transferee from the heir-at-law who is the plaintiff, appellant, and on the other hand, by the transferees from the executor who are the defendants respondents. The occupancy holding, it is not disputed is not transferable by custom or local usage. In so far as the plaintiff is concerned, his transfer from the heir-at-law has been recognised by the landlord, and no question can arise as to its validity on that ground. The substantial question in controversy is, whether the testamentary disposition was valid and operative so as to exclude the heir-at-law, because if there was a valid testamentary devise, the property passed to the executor, and the heir-at-law consequently took nothing. On behalf of the defendants respondents, it has been contended that the occupancy holding, though not transferable by custom or local usage, may be the subject of a valid testamentary disposition. The Bengal Tenancy Act admittedly does not contain any provision expressly applicable to this subject. But our attention has been drawn to section 26 which regulates the devolution of occupancy right when a raiyat dies intestate, and it has been argued that the Legislature has herein, by implication, indicated that a raiyat is competent to make a testamentary disposition of his occupancy right. There is clearly no force in this contention. In the first place, if we were to accept the mode of interpretation of section 26 suggested by the respondents, we would have to contravene the elementary rule of construction that rights cannot be conferred by mere implication from the language used in a statute; there must be a clear and unequivocal enactment: *Arnold* v. *Mayor of Gravesend*.[1]

[1] (1856) 2 K. & J. 574, 591; 110 R. R, 372.

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In the second place, full effect would be given to the implication contained in section 26, if it were shown that a raiyat is competent to make a testamentary disposition of his right of occupancy in certain events. Now, section 178, sub-section (3), clause (*d*) indicates that in this respect the right of an occupancy raiyat stands on the same footing as his right to transfer his holding. Clause (*d*) provides that nothing in any contract made between a landlord and a tenant after the passing of the Act shall take away the right of a raiyat to transfer or bequeath this holding in accordance with local usage. In the case before us, no local usage has been proved and the respondents are not in a position to support the validity of the bequest as made in accordance with a local usage. The respondents have consequently been driven to take up a different position. Their contention is that the heir-at-law is estopped from questioning the validity of the devise made by the testator, and in support of this view reliance has been placed upon the judgment of Mr. Justice Doss in the case of *Hari Das Bairagi* v. *Udoy Chandra Das*.[1] It may be conceded that the view taken by that learned Judge does support the argument for the respondents. But it is worthy of note that when an appeal was preferred under the Letters Patent against the decision of Mr. Justice Doss, the decree was affirmed on a different ground: *Udoy Chandra Das* v. *Hari Das Bairagi*.[2] It is consequently impossible for us to treat the matter as concluded by authority, although the opinion expressed by Mr. Justice Doss must be deemed entitled to the highest consideration. On behalf of the appellant, the correctness of the view taken by Mr. Justice Doss has, however, been controverted; and we have been invited to examine the grounds upon which that opinion is based.

Mr. Justice Doss points out, in the first place, that a transfer of an occupancy holding is not a void transaction, that it is binding between the parties, namely, the transferor and the transferee, and all persons claiming through them, and that it is voidable only at the option of the landlord or his representative in interest. This view is founded on the doctrine of estoppel, which was clearly recognized by Phear, J.

[1] (1908) 12 C. W. N. 1086; 8 C. L. J. 261. [2] (1909) 10 C. L. J. 608.

when he observed in *Bibee Suhodra* v. *Maxwell Smith*[1] that the raiyat "certainly could not himself recover it (the holding) from the stranger to whom he had transferred it for valuable consideration," and by Couch, C. J., when he remarked in *Narendra* v. *Ishan*[2] that "the raiyat could not recover possession from the transferee, as he would be bound by his act of transfer." To the same effect is the express decision in *Bhagirath Changa* v. *Sheikh Hafizuddin*,[3] where Stevens, J., pointed out that when the occupancy raiyat has transferred his holding on the representation that he had a transferable interest therein, he cannot, on principles of equity and good conscience, be permitted to prove against the transferee who had paid consideration for the transfer, that he had no transferable interest to convey. This is an intelligible principle, recognized so long and so firmly established that its soundness cannot now be successfully challenged. Mr. Justice Doss then concludes that if this is the character of the transaction, namely, the character of a voidable transfer, "it seems to follow that the heir of an occupancy raiyat ought to be held bound by a transfer of the holding made by a will." The learned Judge then proceeds to state the reason for this inference, namely, that if the heir is bound by a transfer for valuable consideration or by a gift, there does not seem to be any reason why he ought not to be held bound by a transfer made by a will. Before we test this reasoning, it is necessary to observe that the broad proposition that the heir of an occupancy raiyat is bound by a gift made by the raiyat himself may, when occasion arises, require examination. Cases are no doubt conceivable where the donee may, by the acceptance of the gift, have altered his position, and may, in such circumstances, be entitled to rely upon the doctrine of estoppel in support of his title. To take a concrete illustration: A is offered two gifts by two of his relations, on the condition that if he accepts one, he must renounce the other; he makes his election in favour of one of the gifts. His position would be altered if that donor were permitted thereafter to prove against him that the donor had no transferable title to

[1] (1873) 20 W. R. 139. [2] (1874) 13 B. L. R. 274, 289; 22 W. R. 22, 26.
[3] (1900) 4 C. W. N. 679.

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convey. But on the arguments addressed to us, we are not prepared at present to accept it as an invariable principle of law that, in every case of gift, the doctrine of estoppel may be applied as between donor and donee. Let it be assumed, however, for the purposes of the present argument and for that purpose alone, that in all cases of transfer for valuable consideration as also in all cases of gift, the heir is bound by the same estoppel as the transferor or the donor himself; does it follow that this principle is applicable to cases of testamentary devise? In the case of transfer *inter vivos*, with or without consideration, there is, on the assumption made, an estoppel in favour of the transferee as against the transferor, and that estoppel is binding upon the heir of the transferor. In the case of a testamentary devise, is there any estoppel as between the testator and the intended legatee or the executor? It cannot be disputed that it is open to the testator, up to the very last moment of his life, to change his mind, and to revoke the disposition made by him. His testament does not come into operation till the moment after his death. Consequently, as between the testator on the one hand and the legatee or executor on the other, there is no room for any possible application of the doctrine of estoppel. The position becomes plain when we recall to mind the nature of the estoppel applicable to cases of transfer for consideration.

The principle is stated lucidly by Lord Denman in *Picard* v. *Sears*[1] in the following terms: "where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." The principle was amplified and re-stated by Lord Selborne in the *Citizen's Bank of Louisiana* v. *The First National Bank of New Orleans*[2] in these terms: The foundation of that doctrine, which is a very important one and certainly not one likely to be departed from, is this that if a man dealing with another for value makes statements to him as to existing facts, which being stated would affect the contract and without reliance upon which or without the statement of

[1] (1837) 6 A. & E. 469; 45 R. R. 538.

[2] (1873) L. R. 6 H. L. 352, 360.

which the party would not enter into the contract and which being otherwise than as they were stated would leave the situation after the contract different from what would have been if the representations had not been made, then the person making those representations shall, so far as the powers of a Court of Equity extend, be treated as if the representations were true and shall be compelled to make them good." Lord Selborne then proceeded to add a very important qualification,—" but those must be representations concerning existing facts "—and thereby emphasised the statement of Lord Cranworth in the case of *Jorden* v. *Money*[1] to the effect that in order to found an estoppel, the representation must be of existing facts and not of mere intentions. It is clear, therefore, that as between the testator on the one hand and the executor or legatee on the other, there is no estoppel. Consequently, so far as the heir-at-law is concerned, he cannot be deemed bound by any derivative estoppel traceable to an estoppel which bound his ancestor. If he is to be bound by any estoppel, it must be an independent estoppel against him ; but on behalf of the respondents no intelligible principle of justice, equity or good conscience has been suggested upon which any such independent estoppel can be reasonably founded.

The truth is that the testament, if it takes effect, comes into operation immediately after the death of the testator ; at the same moment, precisely the statutory right of inheritance comes into operation ; and there is no reason why an estoppel should be applied against the heir-at-law so as to deprive him of what he is entitled to take under the statute. We are thus constrained to hold that the view taken by Mr. Justice Doss cannot be supported on principle, and that in the case of a testamentary devise of a non-transferable occupancy holding the heir-at-law is not debarred by the doctrine of estoppel from questioning its validity. In the case before us, the result follows that there was no valid disposition in favour of the executors. The plaintiff, as the transferee from the heir-at-law by successive devolution, is consequently entitled to the property claimed, in respect whereof the defendants are trespassers in the eye of the law.

[1] (1854) 5 H. L. C. 185.

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The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored with costs both here and in the Court of appeal below.

Appeal allowed.